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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 545.188

THE DENVER AND RIO GRANDE RAILROAD COMPANY,
APPELLANT,

vs.

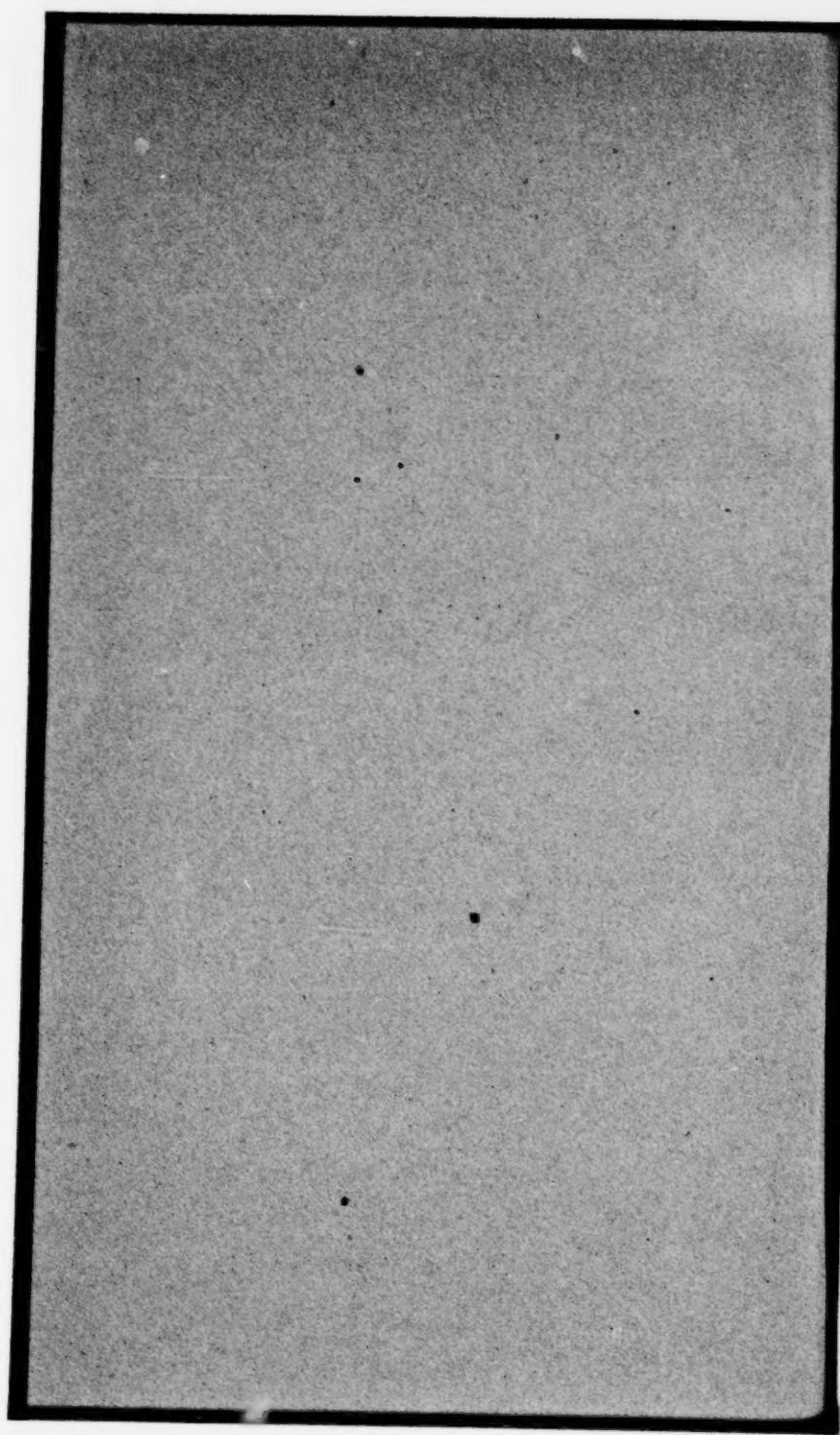
THE ARIZONA AND COLORADO RAILROAD COMPANY OF
NEW MEXICO.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW
MEXICO.

FILED FEBRUARY 10, 1913.

(23,052)

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a UNITED STATES OF AMERICA.

To the Arizona & Colorado Railroad Company of New Mexico, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington within sixty days from the date hereof, pursuant to an appeal taken from the Supreme Court of the Territory of New Mexico, wherein the Denver & Rio Grande Railroad Company, was appellant and you were appellee, to show cause, if any there be, why the judgment rendered against the said appellant as — the said appeal mentioned, should not be corrected, and why speedy Justice should not be done in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, and the seal of the Supreme Court of the Territory of New Mexico, this the 2nd day of January, A. D., 1912.

WILLIAM F. POPE,
Chief Justice Supreme Court of N. M.

I hereby acknowledge service of copy of above citation this third day of January, 1912.

T. B. CATRON,
Attorney for Arizona & Colorado R. R. Co.

1 Be it remembered, that heretofore, on to wit on the Thirtieth day of June, A. D., 1908, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico a certain cause entitled The Arizona & Colorado Railroad Company of New Mexico, vs. the Denver & Rio Grande Railroad Company appellant and numbered 1237 portions of which said transcript of record were and are in the following words and figures to-wit:

2 TERRITORY OF NEW MEXICO,
County of Bernalillo:

Be it Remembered, that heretofore, to-wit, on the second day of June, 1906, there were filed in the office of the clerk of the district court of said county of Bernalillo, certain papers in a cause wherein the Arizona & Colorado Railroad Company, of New Mexico is plaintiff and the Denver & Rio Grande Railroad Company is defendant, which papers were a bill of complaint, injunction bond, injunction and summons with return thereon, demurrer, motion for appeal, appeal bond, mandate and opinion of the supreme court of New Mexico, answer, reply, notice, motion for a change of venue, and a transcript of the docket and record entries in said cause in the district court of the County of San Juan, in the said Territory, which said papers were in words and figures following, to-wit:

TERRITORY OF NEW MEXICO,
County of San Juan, ss:

In the District Court.

In Equity.

THE ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO, a
 Corporation, Plaintiff,

VS.

THE DENVER & RIO GRANDE RAILROAD COMPANY, a Corporation,
 Defendant.

To the Honorable Judges of the District Court in and for the
 County of San Juan and Territory of New Mexico:

3 The Arizona & Colorado Railroad Company of New Mexico, a corporation organized and existing under and by virtue of the laws of The Territory of New Mexico and authorized to do business in the said Territory of New Mexico and in said County of San Juan and other counties thereof, brings this bill of complaint against the Denver & Rio Grande Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Colorado;

And thereupon your orator, said complainant, avers and says:

That said complainant, your orator, is a corporation duly organized and existing under, by virtue of, pursuant to and in accordance with the laws of the Territory of New Mexico, for the purpose of constructing, building, maintaining and operating a line of railroad from a point on the boundary line between the State of Colorado and the Territory of New Mexico, at or near the point where the Las Animas River crosses the same in the County of San Juan, Territory of New Mexico, to a point on the boundary line between the Territory of New Mexico and the Territory of Arizona at or near where the San Francisco River intersects said boundary line about three miles north of the Grant County line; and that it has fully and duly complied with all the laws of said Territory of New Mexico relating to such corporation and by virtue of a full compliance with such laws has been and is authorized and empowered to build, construct, maintain and operate its line of railroad and tracks between said points in and through said Territory of New Mexico, and to condemn, purchase, acquire, take and hold lands, premises and rights of way for said purposes; and for all and any purposes necessary to the construction, operation and maintenance of such line of railroad in said Territory.

Second, That by the terms of its Charter and under and pursuant thereto, said complainant is authorized and empowered,
 4 inter alia, to build, construct, maintain and operate a line of railroad between the points hereinbefore mentioned in said County of San Juan and other counties of said Territory and under and pursuant to such Charter and the laws of said Territory said

complainant is duly authorized and empowered to condemn, purchase, acquire, take and hold all lands, premises, rights of way and property necessary or proper for the purposes of construction, maintenance and operation of any of such lines of railroad.

Third. That a portion of the line of said road which complainant is so authorized and empowered to construct, maintain and operate as aforesaid, and for which complainant corporation was so organized and chartered, extends in a southerly direction through the said County of San Juan from a point on the northern boundary of said County and in the valley of the Las Animas River, to the Town of Farmington, at or near the junction of said Animas River with the San Juan River in said County and from thence in a southerly direction to its southern terminus above mentioned.

Fourth. That on or about the sixth day of October, 1904, the said complainant duly filed in the office of the Secretary of said Territory its articles and certificate of Incorporation and all necessary and proper papers and instruments in connection therewith and paid all fees and charges required by law and fully and duly complied with all the provisions of law to complete and perfect its organization and incorporation and then became and was and ever since has been and now is duly organized and incorporated under and by virtue of such laws of said Territory and duly authorized and empowered to construct, maintain, and operate such line of road, and all and every the lines and parcels of road and track hereinafter mentioned and described, and to condemn, purchase, acquire, take and hold all property and rights of way and do all things necessary and proper for the purpose of such location, construction, maintenance and operation of said road:

Fifth. That immediately upon its said organization as aforesaid, the said complainant, in good faith, and with the bona fide intention of constructing, maintaining and operating its said road, undertook the location of its said line of road and for that purpose employed a large force of civil engineers, surveyors and assistants to run the preliminary and definite location lines of its said road, and in good faith continued to prosecute such work continuously from thence up to the present time, at great expense, and with a large force of employees and that said complainant has at all times since its said organization as aforesaid, in good faith and with the bona fide intention of constructing, maintaining and operating said line of road, and with due diligence and at great expense continuously been engaged upon such work and in making, fixing and determining the definite locations of its said line so that the same might be constructed upon the best possible alignment and grades and so as to best subserve the purposes of complainant's charter and the interests of said Territory and the inhabitants thereof; and that finally, after repeated examination and surveys, said complainant has heretofore and on, to-wit, about the first day of February, 1905, completed its surveys of said line from said point in the northern boundary of said County of San Juan to said Town of Farmington and has made, adopted, fixed and determined the definite location of said portion of said line and has marked and staked the same on the ground, and,

in compliance with the laws of said Territory, has made for filing in the office of the Secretary of said Territory a map and profile thereof and of the land required and taken for the use thereof and of the boundaries of the several counties through which the same runs and has also made similar maps of the parts thereof located in different counties in the office of the Clerk of the County

6 in which such parts of the road are situated, which will be filed as soon as possible and within a reasonable time to be and remain on record therein forever; and has in all things duly complied with all the laws of said Territory relating to and concerning such surveys, location and right-of-way of said road; and that each and every such step were taken and acts and things done by said complainant in good faith, with the bona fide intention and for the purpose of constructing, maintaining and operating said line of road as a common carrier of freight and passengers; and that it has at all such times been and now is the bona fide intention of your orator and complainant to build and construct such road as speedily as possible and to maintain and operate the same as part of a through main line of road for the carriage of passengers and freight under and agreeably to the laws of said Territory.

Sixth. That in making such surveys and location, your orator, the complainant, has caused the said line of road to be properly surveyed and marked and has fixed and determined the alignment, grade, contour and profiles thereof with reference to the whole line and road to be constructed by it, and has expended much time and money to make such line and grade the best possible for the purposes of a main line for the safe, speedy and economical carriage of passengers and freight; and that to enable it to carry on its business for which it was so organized as aforesaid, and to operate its said road with safety and for the best interests of the public and of said company it is necessary that its said alignment and grades be preserved and protected and that it be enabled, without interference, to construct and operate such line and road upon and in accordance with the said line and grades so adopted and located by it as aforesaid.

7 Seventh. That such road, when completed in accordance with the provisions of your orator's charter and its bona fide purpose and intention, will be a main, through line of railroad, connecting populous centers having a large traffic with each other and with other places over said line of road, and that frequent trains will pass daily over said line carrying passengers, mails, express and freight and that any change in or interference with the line and grade so adopted by complainant for the construction of said road, will materially impair and interfere with its capacity and efficiency and increase the danger and hazard of the operation of such road both to complainant and the passengers upon its trains as well as to the public.

Eighth. That in the examination of and location of its said line as aforesaid, and in securing rights-of-way your orator, in good faith has laid out and expended more than one hundred thousand dollars (\$100,000) and has been continuously engaged thereon with many

servants and employees for many months, and ever since its said incorporation as aforesaid, and now and at all times hereinafter mentioned has been and is continuously at work thereon with the bona fide intention and purpose of completing the construction of such road and of maintaining and operating it as a common carrier of passengers and freight; and that complainant is able to and will so complete, maintain and operate such road with all due diligence and dispatch.

Ninth. That as a part of its said line and road so surveyed, located, staked and marked on the ground between said northern boundary of said San Juan county and said Town of Farmington, your orator, the complainant, has so surveyed, located, staked and marked on the ground and definitely fixed and determined the location and grade of its said line over and across each, all and every the following described lots and parcels and subdivisions of ground, all of which are situate in said County of San Juan, Territory of New Mexico, to-wit, The Northeast quarter (n. e. 1-4) of Section Thirty-three (33) in Township 32 N. R. 10 W. N. M. P. M., owned, occupied or claimed, as your orator is informed and believes, by one W. H. Whitney.

The Southeast quarter (s. e. 1-4) of Section Five (5) Township Thirty-one (31) North, R. 10 W., N. M. P. M., owned, occupied and claimed, as your orator is informed and believes, by one W. W. McEwen.

The west half (w. 1-2) of the southeast quarter (s. e. 1-4) and the southeast quarter of the southwest quarter (s. e. 1-4, s. w. 1-4) of Section Eighteen (18) in Township Thirty (30) north, Range Eleven (11) W. N. M. P. M., owned, occupied or claimed, as your orator is informed and believes, by one Edith B. M. Young.

The northwest quarter (n. w. 1-4) of Section Thirty-two (32) Township Thirty (30), north, Range Twelve (12) west, N. M. P. M., owned, occupied and claimed, as your orator is informed and believes, by one F. M. Quinn.

The northwest quarter (n. w. 1-4) of Section Six (6), Township Twenty-nine (29), north, Range 12, west, N. M. P. M., owned, occupied and claimed, as your orator is informed and believes, by one M. B. Hendrickson.

The southeast quarter (s. e. 1-4) of Section One (1), Township Twenty-nine (29), north, Range Thirteen (13), west, N. M. P. M., owned, occupied and claimed, as your orator is informed and believes, by one T. R. Bouseman.

The southwest quarter of the northeast quarter (s. w. 1-4, n. e. 1-4) and the west half of the southeast quarter (w. 1-2, s. e. 1-4) of Section Eleven (11), Township Twenty-nine (29), north, Range Thirteen (13), west, N. M. P. M., owned, occupied and claimed as your orator is informed and believes, by one Wayne Walling.

The west half of the northwest quarter (w. 1-2, n. w. 1-4) of Section Fifteen (15), Township Twenty-nine (29), north, Range Thirteen (13), west, N. M. P. M., owned, occupied and claimed, as your orator is informed and believes, by one Julia A. Miller.

Tenth. That after making such survey and location of said line through said several lots and parcels of land in paragraph nine hereof mentioned and described, your orator began, and is now preparing for record, and within a reasonable time will make and file maps and profiles showing such line and location through each and every said lots and parcels of land and the land required and taken for the use thereof in the offices of the Secretary of said Territory and of the Clerk of said San Juan County in all things as by law required.

Eleventh. That your orator has been able to agree and has agreed with each and every the owners of each and every said parcels of land in paragraph nine hereof mentioned and described, except only W. H. Whitney, owner of the northeast quarter (n.e. 1-4) of Section Thirty-three (33), T. 32 N. R. 10 W., N. M. P. M., aforesaid, upon the compensation to be paid for the taking and use of the said land and right-of-way for the said road through, over and across said several subdivisions of land and each of them; and said several owners and each of them have made and executed their several agreements and instruments in writing duly acknowledged, wherein and whereby they and each of them have and did severally agree to convey to your orator for the purposes of said road the said land so located, taken and appropriated for the line and location of such road, for the consideration and upon the terms in said instruments mentioned, and that due notice in writing of the existence of each and every of said instruments and agreements and the lands affected thereby have been by complainant duly filed for record and recorded in the office of the Clerk of said San Juan County

10 and were so filed for record and recorded long prior to the commission of the acts of defendant hereinafter complained of; and that each and every such agreement still remains in full force, effect and validity.

Twelfth. That by such survey and location and adoption and a full compliance by your orator with all the laws of said Territory, relating to such incorporation and the survey, location and construction of such road, and under and by virtue of such agreements and the laws of said Territory, your orator became and is, and at all times herein mentioned was, vested with and had and has the first and prior right to take, use and occupy for public purposes and the purpose of its said line of road the line and route and premises so surveyed, located, appropriated and adopted by it through, over and across each and every the said lots, parcels and subdivisions in paragraph nine (9) hereof mentioned, which right was and is prior and superior to any right of the defendant therein or thereto.

Thirteenth. But your orator says that long after the organization and incorporation of the complainant company in the manner and for the purposes as hereinbefore set out, and long after the location and adoption of its said line from the northern boundary of said county of San Juan to the town of Farmington by complainant, and the location and adoption of its said line through, over and across the several tracts and parcels of land, and each of them, in paragraph nine hereof described, and long after said portions of

said line had been by complainant marked and staked on the ground, and after such line and right-of-way had been adopted and appropriated by complainant as aforesaid, the said defendant, The Denver & Rio Grande Railroad Company, with full notice and knowledge that your orator had so located, taken, fixed and determined its

11 said line of road and had so taken, adopted and appropriated said line and right-of-way through, over and across said tracts and parcels of land in paragraph nine hereof mentioned and described, and each of them, as well as over and across other tracts and parcels along its said route, for the purposes of construction, maintenance and operation of complainant's said line of road, and with full notice and knowledge that said complainant was proceeding with due and proper diligence to complete its location and the construction of its said line, and that it intended to and would complete the same over and along the line so surveyed, marked, located and adopted by it, undertook and began the construction of a parallel line of railroad, extending from the city of Durango, in the State of Colorado, to the said town of Farmington, which said road extends from a point on the northern boundary of said San Juan County very near to the point where complainant's said road and line crosses said northern boundary of said County, to said town of Farmington, and, except where it interferes with and occupies the right-of-way and location of complainant's said line, as hereinafter set out, the said road so projected and being constructed by defendant is substantially parallel to the said line so located, adopted and acquired by complainant as herein set out.

Fourteenth. That said line of road so projected and being constructed by said defendant, as aforesaid, crosses the northern boundary of said County of San Juan and of said Territory of New Mexico on the east side of the route and line so located and adopted by your orator as hereinbefore set out, and that the terminus of defendant's said line in the said town of Farmington is also on the same side of your orator's said line and route; and that both said lines are laid out down the valley of the Animas River between said points.

That along the lines of said roads, between said northern boundary of said Territory and County and the town of Farmington, aforesaid, the valley and country is comparatively level and open and

12 that there are no cañons, mountain passes, or gorges or other places where it would be impossible or difficult or inconvenient to construct another line of railroad and to obtain rights-of-way and location therefor without in any manner encroaching or trespassing upon or using, taking or occupying any part of the right-of-way or located and adopted line of your orator's said line and route of road.

And that there is no physical reason, or any reason or condition, requiring any company or individual, who may desire to construct a line or railroad from said point on the northern boundary of said county, where defendant's road has been located, to its terminus in said town of Farmington, to cross the line of your orator's road so located and adopted by it as aforesaid, or to encroach upon, or use, take or occupy any part of its right-of-way

and location at any point or points, and that no crossings of your orator's line or road are necessary to enable defendant, or any other person or persons, to so construct, maintain and operate a line of road between said points; nor is it necessary, in the construction of such road, to encroach upon or take, use or occupy any part of your orator's location, right-of-way or road.

Fifteenth. And your orator further shows, that wholly ignoring the survey and location so made and adopted by complainant as aforesaid, and the rights of complainant in and to its said line and route, and with full notice and knowledge of the said location and adoption by complainant of its said line and route and of the rights therein and thereto acquired by and vested in complainant as aforesaid, the said defendant has without right, unlawfully, wrongfully and repeatedly entered in and upon the said premises, right-of-way and located line of complainant; and laid out, surveyed, staked and marked on the ground its line of road along, over and across the line, route and right-of-way of complainant aforesaid, and has attempted to take and use, and proposes to take, occupy and use,

for the purposes of construction, maintenance and operation
13 of its said line of road, large parts and portions of said line and route and right-of-way so theretofore located, adopted, appropriated and acquired by complainant as aforesaid for the construction, maintenance and operation of its own line of road:

And that said defendant wrongfully, unlawfully and without right on, to-wit, said northeast quarter (s.e. 1-4) of Section Thirty-three (33), T. 32 N. R. 10 W., N. M. P. M., herein before mentioned has entered in and upon complainant's location, right-of-way and premises, aforesaid, and laid out, surveyed, staked and marked and attempted to locate its line of road and right-of-way along, upon, over and across the said line, right-of-way and premises of complainant longitudinally for a distance of about five hundred and fifty feet and entering upon and leaving said premises at an angle of about ten degrees.

And on, to-wit, said the southeast quarter (s.e. 1-4) of Section Five (5) T. 31 N. R. 10 W., N. M. P. M., aforesaid, said defendant has again wrongfully, unlawfully and without right entered in and upon the said line, route, right-of-way and premises of said complainant and laid out, surveyed, staked and marked and attempted to locate its line of road and right-of-way along, over and across the said line, right-of-way and premises of complainant, recrossing the same at an angle of about 35 degrees to the same side of complainant's said line on which defendant's said line was located up to the point of the first intersection and crossing above mentioned.

And on, to-wit, the southeast quarter of the southwest quarter (s.e. 1-4, s.w. 1-4) of Section Eighteen (18) T. 30 N.E. 11 W., N. P. M. P. M., aforesaid, said defendant has again wrongfully, unlawfully and without right laid out, staked and marked on the ground and attempted to locate its said line of road along, over and across the said line, right-of-way and premises of complainant as aforesaid, longitudinally for a distance of about five hundred

feet, and entering upon said premises at an angle of about 10 degrees and again departing therefrom on the other side at about the same angle.

And on, to-wit, the said northwest quarter (n.w. 1-4) Section Thirty-two (32) T. 30 N. R. 12 W., H. M. P. M., aforesaid, said defendant has again wrongfully and without right laid out, marked and staked on the ground, and attempted to locate its said line and road along, over and across the said line, right-of-way and premises of complainant, longitudinally for a distance of about four hundred and twenty-five feet, entering upon and departing from said premises at an angle of about 15 degrees and again returning to the same side of complainant's said line and road upon which defendant's line was located prior to said first crossing aforesaid:

And on, to-wit, the northwest quarter (n.w. 1-4) of Section Six (6) T. 29 N. R. 12 W., N. M. P. M., aforesaid, said defendant has again wrongfully, unlawfully and without right entered in and upon the said line, route, right-of-way and premises of said complainant and has wrongfully, unlawfully and without right laid out, surveyed, staked and marked on the ground and attempted to locate its line of road and right-of-way over, along, across and upon the said line, right-of-way, and premises of complainant longitudinally for a distance of about one thousand feet, entering upon said premises and leaving the same at an angle of about 5 degrees, and again re-crossing to the other side of the said line and route of said complainant.

And on, to-wit, the southeast quarter (s. e. 1-4) of Section One, T. 29 N. R. 13 W., N. M. P. M., the said defendant has again wrongfully, unlawfully and without right laid out, surveyed, staked and marked on the ground and attempted to locate its said line of road along, over and across the said line, right-of-way and premises of complainant, as aforesaid, longitudinally for a distance of about five hundred and fifty feet, entering upon said premises at

an angle of about 10 degrees and departing therefrom and in a somewhat lesser angle, and again returning to the same side of complainant's said line on which defendant's said line was located, up to the point of the first intersection and crossing above mentioned.

And on, to-wit, the northwest quarter (n. w. 1-4) of the southeast quarter (s. e. 1-4) of Section 11 T. 29 N. R. 13 W., W. M. P. M., said defendant has again wrongfully, unlawfully and without right laid out, surveyed, staked and marked on the ground and attempted to locate its line of road and right of way along, over and across the said line, right-of-way and premises of complainant, longitudinally for a distance of about one thousand feet, entering upon and leaving said line of road at a very acute angle of about 5 degrees and again departing to the other side of complainant's said line and route.

And on, to-wit, the southwest quarter of the northwest quarter (s. w. 1-4, n. w. 1-4) of Section 15 T. 29 N., R. 15 W., N. M. P. M., said defendant has again wrongfully, unlawfully and without right laid out, staked and marked on the ground and attempted to lo-

cate its said line of road along, over and across the said line, right-of-way and premises of complainant, as aforesaid, longitudinally for a distance of about two hundred and seventy-five feet, leaving the said right-of-way and line of complainant on the same side of said line on which defendant's said line was located, up to the point of the first intersection and crossing above mentioned; and at such and other and different points along your orator's said line and route and right-of-way in said County, so surveyed, located, adopted and appropriated by it as aforesaid, has entered in and upon and threatens to enter in and upon and to take, occupy and appropriate your orator's said line, route and right-of-way.

Sixteenth. That the said line of defendant's said road as so surveyed, staked and marked on the ground and attempted
16 to be located as aforesaid, unnecessarily crosses and recrosses the said line and route and premises so located, appropriated and acquired by complainant for the purposes of its said road, as aforesaid, between said northern boundary of said Territory of New Mexico and said town of Farmington, at the places and in the manner as aforesaid, no less than eight times within a distance of about twenty-eight miles; and unnecessarily and wrongfully encroaches upon and occupies a large portion of the line, right-of-way and premises of complainant so located, acquired and held for said purpose, and that at none of said places, or at any place or point is it necessary for, or in, the construction, maintenance or operation of its said line of road between said points for said defendant so, or at all, to cross, intersect, take, use or occupy any part of complainant's said line road, right-of-way or premises or to encroach upon or interfere therewith in any manner.

Seventeenth. That in such survey and attempted location and at the points where said line of defendant's road as so surveyed and marked enters upon, intersects or occupies the premises of complainant as aforesaid, said defendant has wholly ignored the grades and profile adopted by complainant for its said line of road; and said defendant has laid out its said line of road and proposes and threatens and intends to construct the same upon grades and profiles arbitrarily fixed by it different from and without reference to the grade and profile so fixed and adopted by complainant at said points of intersection and interference and unless restrained by this honorable court, said defendant will proceed to construct and will construct, maintain and operate such road along, over upon and across complainant's said line, right-of-way and premises at the points aforesaid with and upon the said grades and profile so arbitrarily fixed and adopted by defendant therefor as aforesaid, and upon other
and different grades and profiles, at said points, than those
17 so fixed and adopted by complainant for its said line of road at said points.

Eighteenth. That each and every the said points of line and premises so entered upon, crossed, intersected, occupied or proposed or threatened to be taken by defendant as aforesaid, and each and every the parts and portions of its said line, right-of-way and premises so located, adopted, appropriated and acquired by com-

plainant, including each and every part thereof in paragraphs nine and fifteen hereof and each of them mentioned and described, belong to and are situated on and are part of the main line and road and right-of-way of complainant, and are and will be in actual use for public purposes in the construction, maintenance and operation of the said line of railroad for the construction, operation and maintenance of which complainant's said organization and incorporation was effected; and each and every of them and the free, unhindered and unimpaired use and occupation thereof by complainant are necessary and indispensable to the proper construction, maintenance and operation of complainant's said line of road, and to enable it properly to carry out and fulfill the purpose of its said incorporation.

Nineteenth. Your orator shows that in all and every its acts and doing herein and in the survey, location, adoption and appropriation of said line and in acquiring the said rights-of-way and in the expenditure of said moneys hereinbefore mentioned, the complainant has at all times proceeded in good faith and with due diligence for the purpose of acquiring a prior right to construct, maintain and operate its line of road as a common carrier of passengers and freight over, along and upon the said line of road and right-of-way so surveyed, located, adopted, appropriated and acquired by complainant as aforesaid, and with the bona fide intention of constructing, maintaining and operating a line of road over and along the same for public purposes for the carriage of passengers and freight under and pursuant to the laws of the said

18 Territory of New Mexico; complainant has in all things duly and fully complied with the laws of the said Territory with respect to the securing and acquiring of such right-of-way and prior right to use and occupy said premises for such purposes, and that it is the bona fide intention and purpose of said complainant to complete said line of road and to maintain and operate the same as a common carrier of passengers and freight; and that the said complainant is and at all times since its organization has been continually and with due diligence engaged in such work for the purposes aforesaid and is now proceeding as rapidly as possible to the construction and completion of said road; and that it has not waived, abandoned or forfeited any of its rights in the premises; and that it is able to, proposes to and will construct said line of road and build, maintain and operate the same as speedily as possible and within the time allowed by law therefor; and that it has already, since its organization, in good faith and with such intention and purpose, expended the sum of more than one hundred thousand dollars (\$100,000.00) in fixing and determining, and locating and acquiring its said line and right-of-way, and for other purposes necessary to the construction of such road.

Twentieth. Your orator further shows that if the said defendant is permitted to so trespass upon, cross, intersect, take, occupy, use and appropriate the said line, the right-of-way so located, adopted, acquired and appropriated by complainant, by means of the crossings, intersections and interferences hereinbefore mentioned and

referred to, or otherwise, the said line and right-of-way — complainant will be practically wholly destroyed and be and become useless and the money expended by complainant in acquiring and locating the same will be lost; that said complainant will be unable to construct, maintain and operate its said line of road along, over and upon said line and right-of-way.

19 Twenty-first. That unless restrained by this honorable court the said defendant will construct and continue from day to day to occupy and operate its line of road along, over, across and upon complainant's said right-of-way at the points and places hereinbefore mentioned with other and different grades and profiles than those adopted by complainant for such points and places, and will thereby render the line, grade and profiles of complainant worthless, and make it impossible for it to construct, maintain and operate its line of road thereon. That such crossings at such grades and profiles would require an entire change in the alignment and grade and profile of complainant's said road. That such crossing, intersection, interference with and occupation of said line and right-of-way of complainant by defendant would greatly and materially interfere with and hamper the said complainant in its operations and in carrying out the purposes of its organization, would endanger the lives and safety of its passengers and render its said line, right-of-way and road unfit for the purposes for which it was intended, and would render the operation and maintenance of said road extremely difficult and hazardous, if the same could be operated at all, and would destroy and impair the very substance of its estate.

Twenty-second. That as complainant is informed and believes the said defendant, in making such crossings and in taking and occupying the said premises of complainant as aforesaid, is not proceeding in good faith for the purpose of securing the best alignment for its road, but as complainant is informed and believes the said defendant wrongfully and for the purpose of destroying and rendering valueless the line, right-of-way and premises of complainant so located, adopted, appropriated and acquired as aforesaid, and wantonly and without any necessity therefor has laid out its line longitudinally along, over and across the said right-of-way and premises of complainant in the places above mentioned, and

20 wrongfully, wantonly and without right or necessity therefor has laid out its line so as to cross and re-cross the right-of-way and line of complainant many times so as to appropriate and destroy the same; and that unless restrained by this honorable court the said defendant will proceed to construct and build its said line of road along and upon the line and grade so surveyed, marked and staked on the ground and attempted to be located by it as hereinbefore set out, and so as to take, occupy and appropriate large parts of complainant's right-of-way and premises so located, adopted and appropriated and acquired by it as aforesaid, and so as thereby to render the whole of said line and premises of no value to complainant and to destroy the same and make it impossible to construct, maintain and operate the said line of road of complainant.

Twenty-third. That the said defendant has repeatedly and at will entered in and upon the said premises of complainant without right or authority therefor and threatens to and asserts the right to construct, maintain and operate its road along the line and grade so surveyed and fixed by it and along, across and upon the right-of-way and premises of complainant at the places hereinbefore stated; that said defendant is now actively engaged with a large force of men in the construction of its said road upon and along the line and survey so fixed by it and in the neighborhood of the said places where such survey interferes and conflicts with complainant's said route and right-of-way as aforesaid; and that said defendant is about to proceed with a large force of men to construct its line of road over and along the line and on the grade so located and fixed by it, and is about to, and, unless restrained by the Honorable Court, will proceed with a large force of employees and laborers to construct and build its road and grade along, across, over and upon the lands and premises and right-of-way of complainant as hereinbefore set out and mentioned, and to commit repeated and innumerable trespasses from day to day upon your orator's said premises and property; that the building of such line and road by defendant in manner as aforesaid will be a continuing trespass and will work great and irreparable injury to complainant and will wholly destroy its rights in the premises.

Twenty-fourth. That complainant has no plain, speedy, and adequate, or any, remedy at law and that to prevent a multiplicity of suits and to protect, maintain and enforce complainant's rights in the premises it is necessary that the court restrain the said defendants from the commission of said act and protect and preserve the rights of complainant in the premises; and that unless this court under its equitable powers does so take cognizance and jurisdiction hereof and grant the relief prayed, your orator and complainant will be without remedy.

Twenty-fifth. Your orator further shows that the said complainant by virtue of and full compliance with all laws of the said Territory of New Mexico relating thereto and by virtue of its first and prior location, adoption and appropriation of said right-of-way and line, and also by virtue of its contracts and agreements with the owner of said premises, and of the authority conferred by law upon it, had and has acquired a first and prior right to the said line, and right-of-way and premises and to construct, maintain and operate a line of road thereon; That such location, adoption and appropriation of such line, route and right-of-way was had and made long prior to the acts of defendant herein mentioned and complained —, and that at, and prior to the time of the said trespasses and wrongful acts of defendant, hereinbefore complained of, your orator under and by virtue of the said authority conferred upon it and pursuant and agreeably to the laws of said territory, had located, adopted, appropriated and acquired such route, right-of-way and premises and entered into possession thereof and was so in possession thereof and entitled to the exclusive right

therein and thereto and possession thereof at and long prior to the said entry and trespass thereon by said defendant and at and prior to the commission of the acts of said defendant herein complained of; That any and all rights of privileges, if any such there be, which have been or may be acquired by the said defendant are subsequent in point of time and are junior and inferior to the vested right of complainant in and to the said premises and each and every part thereof.

Twenty-fifth. Complainant further shows to the court that it has made repeated efforts to confer with the said defendant and its officers, agents and employees for the purpose of adjusting the many controversies between them with respect to such rights-of-way and such interferences, crossings and intersections, and has in good faith endeavored to agree with defendant as to what crossings, intersections and connections, if any, shall be made, and as to the place and manner of making the same, but that the said defendant has wholly failed and refused, though often thereto solicited by complainant, to take any steps towards or to make any effort for an agreement or adjustment of any of said matters between said complainant and defendant.

Twenty-sixth. Your orator further shows to the court that he does not know and has not been able to ascertain upon what authority or pretended authority the said defendant is proceeding to lay out and construct the said line of road. That he is informed and believes that the said defendant has not complied with the laws of the Territory of New Mexico with relation to the construction and operation of said line of road; and that the said defendant has not authority under such laws, or any authority, to proceed to lay out, construct, maintain and operate such road; and that all and every its acts and doings in the premises are without authority of law therefor; and that the said defendant has not thereby or thereunder acquired and does not have any right or authority to construct, maintain and operate such or any line of railroad in said territory.

That your orator has never in any manner consented to or authorized any of the said acts or doings of said defendant in the said taking, occupation and use of any of its premises, and that no proceedings in any court have been begun by said defendant against this complainant nor is any suit or proceeding, to which complainant is made a party, now pending in any court for the condemnation or appropriation by defendant of said route, right-of-way or premises or any part thereof under the rights of eminent domain or under any provisions of law; and that the terms and conditions upon which such intersections or crossings or any of them may be made, have not been agreed upon by the parties, nor have they agreed upon the compensation to be paid therefor or the points at which or the manner in which such crossings, intersections and connections shall be made, nor has said defendant made any attempt to make any such agreement with complainant with reference to any such matters.

But that complainant is informed and believes that the said defendant, well knowing the complainant's prior right, title and interest in and to the lands and premises, line, survey, location and right-of-way so located, appropriated and acquired by complainant, as aforesaid, and with full notice and knowledge that complainant had theretofore so located, appropriated and acquired its said route, line, right-of-way and premises, as hereinabove set out, is proceeding or is about to proceed against some or all the owners of the lands and premises hereinabove described, without notice to complainant, and without making it a party thereto, to condemn a right-of-way

for defendants said proposed line so surveyed and attempted to be located over and across said lands and premises, and over, along and across the said line, route, right-of-way and premises of complainant, as hereinabove more specifically set out, and has instituted or is preparing and is about to institute numerous proceedings against said parties for said purpose:

That in and by such proceedings said defendant seeks and will seek to condemn and appropriate to its own use large parts and portions of the said line, right-of-way and route so located, appropriated and acquired by complainants as aforesaid, and that if permitted to proceed with such actions and proceedings, or to enter into possession of said premises or any part thereof under or by virtue of any order or judgment made or entered in such proceedings or any of them, a great multiplicity of suits, actions and proceedings will be necessary to protect and enforce complainant's rights in each of said several actions or proceedings so institute or to be instituted by defendant and in and to the premises affected thereby, and complainant will be without any adequate remedy and will suffer great and irreparable damage and injury.

Complainant therefore prays that said defendant and its contractors, officers, agents, servants and employees and all persons acting by or under the authority or direction or control of said defendant, its officers, agents, contractors or employees, be restrained and enjoined, until the further order of this court, from in any manner entering or trespassing upon or interfering with any of said line, route, right-of-way and premises so located, appropriated and acquired by complainant for the purposes of its railroad in said San Juan county, as aforesaid, or any part thereof, and from building or constructing over, across, along or upon the said line and right-of-way so surveyed and adopted by complainant in and through said County of San Juan as aforesaid or any part thereof any grade, cut, fill, embankment, road or railroad, or placing any ties, rails or other material thereon or removing any earth or other material therefrom; and that said defendant, its agents, representatives and attorneys and each of them be enjoined and restrained from instituting, prosecuting or proceeding with any condemnation suit or proceeding affecting the line, route, lands or premises so located, appropriated and acquired by complainant, as aforesaid, except upon the order of this court in this action and upon such terms and conditions as may be imposed by this court;

and that on final hearing such injunction be made permanent and said defendant, its officers, agents, contractors, servants and employees and all persons acting under the authority, direction or control of them or either of them be absolutely and forever enjoined from in any manner entering or trespassing upon said premises or any part thereof, or building, placing, constructing or erecting any road, materials or structure thereon or removing any materials or earth therefrom or making any crossings or intersections or connections with said line, route or road of complainant except only in such form and manner and on such terms and conditions as may be ordered and fixed by this Court;

That the Court make such other, further and additional orders, entries, judgment and decree as may be necessary to fully protect, maintain and establish complainant's rights in the premises and to protect and preserve its said line and right-of-way and the alignment and grades thereof, and the right of complainant freely to construct, maintain and operate its said line of railroad over and upon the same.

May it please your honors to grant unto complainant a writ of subpoena, under the seal of this Honorable Court, directed to the defendant, The Denver & Rio Grande Railroad Company, commanding it to be and appear before this Honorable Court on a day and under a penalty to be named and fixed therein then and there
25 to make full answer hereto, but not under oath, an answer under oath being hereby expressly waived, and to abide the order and decree of the Court in the premises.

THE ARIZONA & COLORADO RAILROAD
COMPANY OF NEW MEXICO,

By RITTER & BUCHANAN,

Of Durango, Colorado, and

A. B. RENEHAN,

Of Santa Fe, N. M.

TERRITORY OF NEW MEXICO,

County of San Juan, ss:

On this 12th day of May, A. D., 1905, personally appeared before me, C. C. Sroufe, of lawful age, who, being by me first duly sworn upon his oath says: that he is the duly authorized Agent of the Complainant, The Arizona & Colorado Railroad Company of New Mexico, a corporation, and makes and has authority to make this affidavit and to verify the annexed bill on its behalf; that he has read the foregoing and attached bill of complaint and knows the contents thereof; and that the same is true except as to matters therein alleged upon information and belief, and as to those matters he believes it to be true.

(Signed)

C. C. SROUFE

Subscribed and sworn to before me this 12th day of May, A. D., 1905.

[SEAL.]

A. M. BERGERE.

Endorsed: Filed in my office May 12, 1905. A. M. Bergere,
Clerk.

Know all men by these presents that we, The Arizona & Colorado Railroad Company of New Mexico, a corporation, as principal and National Surety Company, of New York, a corporation duly authorized to execute bonds for Judicial, Fidelity and other purposes, in the Territory of New Mexico, as surety, are held and firmly bound unto The Denver & Rio Grande Railroad Company, a corporation, in the penal sum of five thousand dollars, to the payment
 27 whereof, well and truly to be made, we bind ourselves, and our successors, jointly and severally, firmly by these presents:

Provided, however, that the said obligation is upon condition that, whereas, the principal has applied for and is about to be granted a temporary writ of injunction to issue out of the office of the Clerk of the District Court of the First Judicial District of the Territory of New Mexico, for the County of San Juan in a certain cause, wherein it is the plaintiff and the payee or obligee is the defendant upon the filing of a bond in the penalty hereof restraining and enjoining the defendant in said cause according to the order of the court in the premises;

Now, therefore, in case the said writ of injunction do issue the undersigned, to-wit, the said principal and the said surety, do hereby agree to pay to the said defendant in said cause their costs and damages, not exceeding the penalty of said bond, in case the said writ of injunction is dissolved as wrongful, unlawful, improvident or improper, as its costs and damages may be lawfully shown.

In witness whereof the said principal and the said surety have caused these presents to be executed by their duly authorized respective agents and the seal of said companies to be attached, the principal using a scroll surrounding the word "Seal" in lieu of an impression seal, this 12th day of May, 1905.

[SEAL.]

ARIZONA & COLORADO R. R. CO.
OF N. M.

By C. C. SROUFE, *Its General Agent*,
NATIONAL SURETY COMPANY.

[SEAL.]

By A. M. BERGERE,
Its Attorney in Fact, and
A. J. ABBOTT, *Its Attorney in Fact*.

TERRITORY OF NEW MEXICO,

County of Santa Fe, ss:

On this 12th day of May, 1905, before me personally appeared C. C. Sroufe, to me personally known and being by me duly sworn did say that he is the general agent of the principal named in the foregoing obligation, and that the scroll in place of an impression seal affixed to the said instrument is for the purposes hereof the corporate seal of the said corporation principal, and that said instrument was signed and sealed in behalf of the said corporation by authority of its board of directors, and the said C. C. Sroufe acknowledged the said instrument to be the free act and deed of said corporation; and on the same day before me also personally appeared A. M. Bergere, attorney in fact, and

A. J. Abbott, attorney in fact, who, being by me duly sworn, each for himself and not one for the other, did say, that they are attorneys in fact of the National Surety Company of New York, and that the seal affixed to said instrument is the corporate seal of the said corporation and that said instrument was signed and sealed in behalf of said surety corporation by authority of its board of directors, and that the said A. M. Bergere, attorney in fact, and the said A. J. Abbott, attorney in fact, acknowledged said instrument to be the free act and deed of the said corporation.

In witness whereof, I have hereunto set my hand and notarial seal the day and year in this certificate first written.

[SEAL.]

A. B. RENEHAN,

Notary Public.

Approved this 13th day of May, 1905.

JOHN R. McFIE,

Judge, etc.

Endorsed: Filed in my office May 13, 1905. A. M. Bergere, Clerk.

Endorsed: Filed in my office this June 2, 1906. W. E. Dame, Clerk.

In the District Court of the First Judicial District of the Territory of New Mexico, for the County of San Juan.

THE ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO, a Corporation, Plaintiff,

vs.

THE DENVER & RIO GRANDE RAILROAD COMPANY, a Corporation, Defendant.

This cause having come on to be heard this 13th day of May, 1905, upon the verified complaint of the plaintiff, and affidavits and plats filed in support thereof, wherein the plaintiff prays for a writ of injunction against the defendant, in manner and form as herein-after set forth, and the court being fully advised in the premises, grants to the plaintiff the writ of injunction, as follows:

1. That said defendant, The Denver & Rio Grande Railroad Company, its officers, agents, servants, contractors, representatives, and employees, and each and every person acting by or under the authority, direction or control of the said company defendant, be and they are hereby, until the further orders of the court in the premises, restrained and enjoined from trespassing upon, interfering with or in any wise molesting and from building or constructing over, across, along or upon, the location, line, route, right-of-way, and premises located and appropriated by the plaintiff, The Arizona & Colorado Railroad Company of New Mexico, in said county of San Juan and Territory of New Mexico, and particularly as the same is laid out, staked and marked on the ground, through governmental sub-divisions following, that is to say, the northeast

quarter of Section Thirty-three, Township Thirty-two, north of Range Ten, west, N. M. P. M., the southeast quarter of Section Five, Township Thirty-one, north of Range Ten, west, N. M. P. M., the west half of the southeast quarter and the southeast quarter of the southwest quarter of Section Eighteen, Township Thirty, north of Range Eleven, west, N. M. P. M., the northwest quarter of Section Thirty-two, Township Thirty, north, Range Twelve, west, N. M. P. M., the northwest quarter of Section Six, Township Twenty-nine, north, Range Twelve, west, N. M. P. M., the southeast quarter of Section One, Township Twenty-nine, north of Range Thirteen, west, N. M. P. M., the southwest quarter of the southeast quarter and the west half of the southeast quarter of Section Eleven, Township Twenty-nine, north of Range Thirteen, west, N. M. P. M., the west half of the northwest quarter of Section Fifteen, Township Twenty-nine, north of Range Thirteen, west, N. M. P. M., and from building or constructing over, across, along or upon said location, route and right-of-way any grade, cut fill, embankment, road or railroad, or placing any materials, ties, rails, machinery or other materials thereon, and from removing any earth or materials therefrom, and also from instituting, prosecuting or proceeding with any condemnation suit or proceedings, insofar only as the same effects the location line, route or right-of-way of the plaintiff as aforesaid.

2. It is further ordered that a copy hereof, with a copy of the complaint for greater particularity, be served upon the defendant with the writ of injunction, at least ten days before the return day hereinafter fixed.

3. It is further ordered that the defendant company show cause, if any it have, at the chambers of the Judge at Santa Fe, New Mexico, at the hour of ten o'clock in the morning of the 2nd day of June, 1905, why the said injunction should not be made
31 perpetual or continued.

4. It is further ordered that the plaintiff or someone for it enter into a good and sufficient bond in the penalty of five thousand dollars, in favor of the defendant, conditioned in usual form for the payment of any damage or loss that may come to the defendant by reason of the said injunction, in case the same is dissolved as unlawful, improvident or improper.

5. It is further ordered that a temporary writ of injunction issue out of the office of the Clerk of the said court, and under the seal thereof, upon the filing of the bond aforesaid, which is to be approved by the court, restraining and enjoining the defendant, as hereinbefore set forth, until the further order of the court.

JOHN R. McFIE,

Judge, etc.

TERRITORY OF NEW MEXICO,

County of San Juan:

I, A. M. Bergere, Clerk of the District Court of the First Judicial District of the Territory of New Mexico in and for the County of San Juan, do hereby certify that the above and foregoing is a true, correct and complete copy of an order of court filed and entered in

the office of the Clerk of said Court on the 13th day of May, A. D., 1905.

In witness whereof I have hereunto set my hand and official seal at my office at Santa Fe, N. M., this 12th day of May, A. D., 1905.

[SEAL.]

A. M. BERGERE, *Clerk*.

In the District Court, First Judicial District, Territory of New Mexico, for the County of San Juan.

32

Writ of Injunction.

The Territory of New Mexico to The Denver & Rio Grande Railroad Company, a corporation, its officers, agents, servants, contractors, representatives and employees, and each of them, and each and every person acting by or under the authority, direction or control of the said company defendant, Greeting:

Whereas, The Arizona & Colorado Railroad Company of New Mexico has lately filed in the office of the Clerk of the District Court of the First Judicial District of the Territory of New Mexico for the County of San Juan its verified complaint, with affidavits and plats in support thereof, against you, praying to be relieved touching certain matters therein alleged, and we being willing that the relief therein prayed be granted:

Now, therefore, you, the said The Denver & Rio Grande Railroad Company, and you, its officers, agents, servants, contractors, representatives and employees, and each of you, and you, each and every person acting by and under the authority, direction or control of the said company defendant are hereby, until the further order of the court in the premises, restrained and enjoined from trespassing upon, interfering with or in any wise molesting the location, line, route, right-of-way and premises located and appropriated by The Arizona & Colorado Railroad Company of New Mexico, in said County of San Juan and Territory of New Mexico, and particularly as laid out, staked and marked on the ground through governmental subdivisions following, that is to say, the northeast quarter of Section Thirty-three, Township Thirty-two, north of Range Ten, west, N. M. P. M., the southeast quarter of Section Five, Township Thirty-one, north of Range Ten, west, N. M. P. M., the west half of the southeast quarter and the southeast quarter of the southwest quarter of Section Eighteen, Township Thirty, north of Range
 33 Eleven, west, N. M. P. M., the northwest quarter of Section Thirty-two, Township Thirty, north of Range Twelve, west, N. M. P. M., the northwest quarter of Section Six, Township Twenty-nine, north of Range Twelve, west, N. M. P. M., the southeast quarter of Section One, Township Twenty-nine, north of Range Thirteen, west, N. M. P. M., the southwest quarter of the northeast quarter and the west half of the southeast quarter of Section Eleven, Township Twenty-nine, north of Range Thirteen, west, N. M. P. M., the west half of the northwest quarter of Section Fifteen, Township Twenty-nine, north of Range Thirteen, west, N. M. P. M., and from

building or constructing over, across, along or upon said location, route and right-of-way any grade, cut, fill, embankment, road or railroad and from placing any materials, ties, rails, machinery or other materials thereon, and from removing any earth or materials therefrom, and also from instituting, prosecuting or proceeding with any condemnation suit or proceedings insofar only as the same affects the location, line, route or right-of-way of the plaintiff. The Arizona & Colorado Railroad Company of New Mexico, and the defendant, The Denver & Rio Grande Railroad Company, may show cause, if any it have, why the said writ of injunction should not be continued or made perpetual, at the chambers of the Judge at Santa Fe, New Mexico, on the 2nd day of June, 1905, at the hour of ten o'clock in the morning of the said day.

And hereof fail not at your peril.

Witness, the Hon. John R. McFie, Associate Justice of the Supreme Court of the Territory of New Mexico, and Judge of the First Judicial District Court thereof, and Judge of the District Court for the County of San Juan, in said District and Territory, and the seal of the said court this 15th day of May, 1905.

[SEAL.]

A. M. BERGERE, *Clerk*.

34 Territory of New Mexico to the Denver & Rio Grande Railroad Company, a corporation, Greeting:

You are hereby commanded to be and appear before the First Judicial District Court of the Territory of New Mexico, sitting within and for the County of San Juan, that being the county in which the complaint herein is filed, within twenty days after the service of this summons, if defendant is served in any County in this Judicial District, otherwise within thirty days after service, then and there to answer the complaint of The Arizona and Colorado Railroad Company of New Mexico, a corporation, in a civil action. You are notified that unless you so appear and answer the plaintiff will apply to the court for the relief demanded in the complaint together with the costs of suit.

Witness the Hon. John R. McFie, Associate Justice of the Supreme Court of the Territory of New Mexico and Justice of the First Judicial District Court thereof, and the seal of said District Court, this 12th day of May, 1905.

[SEAL.]

A. M. BERGERE, *Clerk*.

TERRITORY OF NEW MEXICO,

County of Santa Fe, ss:

Know all men by these presents that I, Antonio J. Ortiz, sheriff of the said County of Santa Fe, do hereby certify that in the cause within entitled, at the said County of Santa Fe, on the 13th day of May, 1905, I served the within summons, copy of order of the court and writ of injunction, together with a copy of the complaint, upon the defendant, within named, by then and there delivering to Fred McBride, general agent of the defendant, at Santa Fe, New Mexico, at the depot and office of the defendant, a true copy of the said sum-

35 mons, a true copy of the order of the court, granting interlocutory injunction, a true copy of the writ of injunction and a true copy of the complaint in said cause filed.

ANTONIO J. ORTIZ, *Sheriff*.
By J. L. LOPEZ, *His Deputy*.

Service and return \$3.50. Paid by plaintiff.

Endorsed: Filed in my office June 3, 1905. A. M. Bergere, Clerk.

TERRITORY OF NEW MEXICO,
County of San Juan, ss:

In the District Court.

THE ARIZONA AND COLORADO RAILROAD COMPANY OF NEW MEXICO,
a Corporation, Plaintiff,

vs.

THE DENVER & RIO GRANDE RAILROAD COMPANY, a Corporation,
Defendant.

Comes now the defendant, The Denver & Rio Grande Railroad Company and demurs to the plaintiff's complaint herein and for ground for demurrer says:

That the complaint does not state facts sufficient to constitute a cause of action against the defendant for the relief prayed for, or for any relief whatever.

First. Because it appears upon the face of said complaint that the Court has no jurisdiction of the subject matter of the action.

36 Second. Because it appears upon the face of the complaint that the plaintiff has full, complete, and adequate remedy at law.

Third. Because it appears upon the face of the complaint that the only controversy between the parties, relates exclusively to certain crossings of the conflicting lines of railroads, as to which the statutes of the Territory of New Mexico confer upon the court full authority to regulate and determine both the place and the manner of crossing.

Fourth. Because it appears upon the face of the complaint, and from admissions therein contained that irreparable injury will not be sustained by the plaintiff.

Fifth. Because it appears upon the face of the complaint that there will not be ground for a multiplicity of suits.

Sixth. Because the complaint discloses the fact that there is no ground or reason for the interference of a court of equity.

WOLCOTT, VAILE & WATERMAN,
REES McCLOSKEY, AND
ABBOTT & ABBOTT,

Attorneys for Def't.

Endorsed: Filed in my office June 2, 1905. A. M. Bergere, Clerk.

TERRITORY OF NEW MEXICO,
County of San Juan, ss:

In the District Court.

THE ARIZONA & COLORADO R. R. CO. OF NEW MEXICO, a Corpora-
tion, Plaintiff,

vs.

THE DENVER & RIO GRANDE R. R. Co., a Corporation, Defendant.

37 Now on this 3rd day of June, 1905, after the rendition of final judgment in said cause sustaining the defendant's demurrer to the complaint and dismissing the complaint at the plaintiff's cost, comes the plaintiff by B. W. Ritter and A. B. Renehan, its attorneys, and moves the court to grant it an appeal from the said final decree to the Supreme Court of the Territory of New Mexico, with supersedeas and to fix the amount of a supersedeas bond in the premises.

B. W. RITTER,
A. B. RENEHAN,
Attorneys for Plaintiff.

Endorsed: Filed in my office June 3, 1905. A. M. Bergere, Clerk.

Know all men by these presents that we, The Arizona and Colorado Railroad Company, a New Mexico corporation, as principal, and the National Surety Company of New York, a corporation duly authorized under the laws of the United States and the Territory of New Mexico, to execute judicial bonds, as surety, are held and firmly bound unto the Denver & Rio Grande Railroad Company, a Colorado corporation, in the penal sum of five hundred dollars, to the payment whereof well and truly to be made we bind ourselves, and our successors, jointly and severally firmly by these presents:

But the foregoing obligation is upon condition that whereas the principal was, on the 3rd day of June, 1905, by the District Court of the First Judicial District of the Territory of New Mexico, County of San Juan, granted an appeal to the Supreme Court of the Territory of New Mexico, from the final decree entered in that certain cause on the civil docket of the said District Court, wherein the principal hereof was plaintiff, and the payee or obligee hereof was defendant, with supersedeas of the said final decree except that said supersedeas shall not affect, apply to or reinstate the order dissolving the injunction in said cause theretofore granted, supersedeas bond being fixed in the sum of five hundred dollars.

38 Now, therefore, if the said principal, the appellant, shall prosecute its appeal with due diligence in the Supreme Court, and if the decree appealed from be affirmed or the appeal dismissed, will perform the decree of the District Court from which said appeal was taken, and pay all damages and costs adjudged against it in the said Supreme Court, on said appeal, then and in such case, this obliga-

tion shall be null and void, but otherwise it shall be and remain in full force and effect.

[SEAL.]

THE ARIZONA & COLORADO R. R.
CO. OF N. MEX.,

By C. C. SROUFE, *Its General Agent*,
NATIONAL SURETY COMPANY,

By A. M. BERGERE,

Its Attorney in Fact, and
A. J. ABBOTT, *Its Attorney in Fact*

TERRITORY OF NEW MEXICO,

County of Santa Fe, ss:

On this 3rd day of June, 1905, before me personally appeared C. C. Sroufe, to me personally known, who, being by me duly sworn, did say that he is the general agent of The Arizona & Colorado Railroad Company, and that the seal affixed to said instrument is the corporate seal of the said company for the purposes hereof, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors; and the said C. C. Sroufe acknowledged the said instrument to be the free act and deed of the said corporation; and on the said day also before me personally appeared A. M. Bergere and A. J. Abbott, to me personally known and who, being by me severally duly sworn, did say, each for himself, and not one for the other, that he is attorney in fact of the National Surety Company, and that the seal affixed to said instrument is the corporate seal of the said corporation, and that said instru-

39 ment was signed and sealed in behalf of said corporation by authority of its board of directors; and the said A. M. Bergere and A. J. Abbott severally acknowledged said instrument to be the free act and deed of said corporation, and did further severally say that the National Surety Company is worth the penalty of the said instrument and bond over and above its just debts and liabilities, and the amount, if any, exempt by law from execution.

In witness whereof I have hereunto set my hand and notarial seal the day and year in this certificate first written.

[SEAL.]

STELLA C. CANNY,

Notary Public.

This bond is hereby approved both as to form and sufficiency of the security. This 5th day of June, 1905.

JOHN R. McFIE, *Judge.*

Endorsed: Filed in my office June 5, 1905. A. M. Bergere, clerk.

The Territory of New Mexico to the District Court sitting within and for the County of San Juan, in the First Judicial District.
Greeting:

Whereas, In a certain cause lately pending before you, wherein the Arizona & Colorado Railroad Company of New Mexico was plaintiff, and The Denver & Rio Grande Railroad Company was

defendant, by your consideration in that behalf, judgment was entered against the said plaintiff; and

Whereas, The said cause and judgment were afterward brought into our Supreme Court for review by appeal whereupon such proceedings were had in said Supreme Court at the January 1903 term thereof on the twenty-first day of said term, the same being 40 January 31st, 1903, it was considered that the judgment aforesaid by you in form given, be reversed, and that the said cause be remanded to you with directions to re-instate said cause and proceed in accordance with the opinion of the court herein, (a copy of which is hereto attached.)

Now, therefore, You are hereby commanded to re-instate said case upon your docket and proceed in accordance with the decision of the said Supreme Court, (copy of which is hereto attached.)

[SEAL.]

Witness the Hon. William J. Mills, Chief Justice of the Supreme Court of the Territory of New Mexico, and the Seal of said Court, this 5th day of March, A. D. 1903.

[SEAL.]

JOSE D. SENA, *Clerk*.

In the — Court of the Territory of New Mexico, January Term, A. D. 1906.

No. 1098.

THE ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO,
Appellant,

vs.

THE DENVER & RIO GRANDE RAILROAD COMPANY, Apellee.

Appeal from District Court, San Juan County.

Ritter, Buchanan and A. B. Renahan, Catron & Gornter and H. B. Fergusson, attorneys for appellant.

Wolcott & Vail and Watterman, McCloskey, Clark and Field, and Abbott & Abbott, attorneys for appellee.

Syllabus.

41 A corporation organized under the laws of New Mexico for the purpose of constructing, maintaining and operating a railroad within the Territory, acquires an interest in a location which, in good faith, it has surveyed, staked out upon the ground, and adopted as its final location, or a portion thereof, sufficient to enable it to maintain an action against a trespasser thereon and will not until after the lapse of the reasonable time after final location allowed for filing, lose such interest by failure to file a map of the location, as required by law.

An averment, by a railroad corporation organized under the laws of New Mexico, in a complaint for acts of trespass on its location,

that it had adopted such location is sufficient as against demurrer without the allegation that it was done by its board of directors, that being the method of adoption prescribed by law.

Allegations of acts of trespass on the location of a railroad corporation, however numerous or continuous, do not amount to an admission that the trespasser is in possession of such location or any part thereof or that the title to it is in dispute when it is also alleged that the complainant is in possession and that the trespasser is seeking to deprive it of its location and the possession thereof by such wrongful acts.

A complaint which avers that one railroad corporation is, by repeated acts of trespass upon the location of another such corporation seeking to deprive the latter of its location, without due process of law, and threatens to continue such acts for that purpose, that such location has been surveyed and established at great expense and is the best possible one between the points which the proposed railroad to be built upon it is designed to connect, although not the only good one available, that a multiplicity of suits will result if such acts are continued and irreparable damage will be caused if such purpose is accomplished, states a case for the interposition of a court of equity, by injunction.

Statement of the Facts.

May 25, 1905, the plaintiff filed its bill of complaint against the defendant in the District Court for San Juan County, alleging, in substance, that it, the plaintiff, was a corporation organized under the laws of New Mexico, in October, 1904, authorized to construct, maintain and operate a railroad in said Territory from a point on the boundary line between New Mexico and Colorado near where Las Animas River crosses the same, through said County of San Juan and other counties of said Territory, to a point on the boundary line between it and the Territory of Arizona, near a point where the San Francisco River crosses it, a distance in all of about three hundred miles; that it had complied with the requirements of law, which are prerequisite to its entering upon the work and business for which it was incorporated, and had thereafter in said San Juan County, from said point in the boundary line between New Mexico and Colorado, south to the Town of Farmington, in said County, a distance of about twenty-eight miles, completed its surveys for said portion of its proposed line of railroad had fixed and determined its location, had marked and staked the same on the ground, had made for filing a map and profile thereof and was about to file the same as required by law, within a reasonable time, and that it had adopted such location. It further alleged that it had agreed with all but one of the private owners of the land on which its location had been fixed, as aforesaid, upon the compensation to be paid for the taking and use of said land and right-of-way, and that instruments in writing embodying such agreements had been made and executed between it and said several land owners, and notice thereof filed for record in the office of the Clerk of said County that its said work

of surveying and marking its location on the ground, preparing maps thereof, securing the right of way therefor, and other things of like nature had been done at great expense, that as a re-

43 sult the route and location it had thus laid out and adopted was the best possible one for the construction and operation of a railroad between Farmington and the point in the Northern boundary line of the territory from which it proposes to construct a railroad as above stated.

The plaintiff further avers that the defendant had full actual knowledge of all its, the plaintiff's doings in the premises, as above set forth, including the agreements made with land owners, and that long after such proceedings by the plaintiff, the defendant undertook and began the construction of a parallel line of railroad, from a point near that to which the plaintiff's said location extends in the Northern boundary line of New Mexico to said Town of Farmington, and that, without necessity and wrongfully, it has entered upon the plaintiff's said location and sought to destroy its usefulness for the plaintiff, by staking out a location for its own railroad upon portions of the plaintiff's said location, that under the pretense of laying out necessary crossings over the plaintiff's said location it has, although each end of its own proposed location is on the same side of and near the plaintiff's location, laid out its own proposed route to cross that of the plaintiff no less than eight times in said distance of about twenty-eight miles, and that such proposed crossings are not made at, or nearly at, right angles with the plaintiff's said location, but in some instances extend along it and occupy as much as a thousand feet each of its length, and besides that defendant proposes to make such pretended crossings at grades substantially different from those established at such points for the plaintiff's said location; all of which the plaintiff says is done and threatened for the purpose, and, if permitted, will have the effect, of substantially depriving the plaintiff of its said location, and rendering the same wholly useless as a route, for the construction and practical operation of a railroad.

44 It was also alleged that, as one of the means to be employed by the defendant to deprive the plaintiff of its location, the defendant proposed and threatened to institute condemnation proceedings to secure a right-of-way and location for itself, including portions of the plaintiff's location, and in such proceedings to ignore the plaintiff's rights, and act without notice to the plaintiff, and only against the owners of the land on which the plaintiff's location was laid out.

The plaintiff concluded with the usual allegations of the need of equitable relief, and with a prayer that the defendant be enjoined from continuing its alleged acts of encroachment.

The defendant demurred to the complaint on the ground that facts were not stated sufficient to constitute a cause of action against the defendant for the relief prayed for or any relief whatever. The demurrer was sustained by the District Court and final judgment entered dismissing the complaint, with costs to the defendant. The case is before this court on appeal from said judgment.

Opinion of the Court.

ABBOTT, J.:

The question first requiring consideration in this case is whether, on the facts well pleaded in its complaint, the plaintiff has such an interest in the premises in controversy, as will entitle it to maintain its action. That part of the statute requirements essential to the acquisition of such a right, or interest, are alleged in the complaint to have been complied with and are there well pleaded as facts, the defendant does not, in the brief presented in its behalf, seriously question. That the survey and staking of a location upon the ground, and similar acts, are a part of the construction of a railroad, appears to be well settled, *C. R. I. & P. R. Co., v. Grimmell*, 51 Ia., 476; *K. Co., & S. E. Ry., vs. K. S. S. & S. W. Ry.*, 129 Mo., 69; *Sioux City, etc. Ry. v. Chicago, etc. Ry.*, 27 Fed. 770.

Such acts the complaint avers were performed by the plaintiff before February 1st, 1905, and so, well within the period of
45 two years allowed by Section 3877 of the Compiled Laws of 1897, for the beginning of construction.

It is claimed, however, that the filing of a map of the proposed location was essential and that as no such filing was pleaded, a necessary element of the plaintiff's title is lacking in its complaint. The provisions of the statute, Section 3876, of the Compiled Laws of 1897, is that a map shall be filed within a reasonable time, "after its road shall have been finally located." It is, at least, open to question whether the plaintiff was required to file any map under that section, until its entire road had been located; but, assuming that such a map should be filed for a portion of the road finally located, the question whether it had been done within a reasonable time, is one of the facts which could not be raised on demurrer. *Wheeling etc. Ry. Co. v. Camden Con. Oil Co.*, 35 W. Va., 205.

The defendant lays great stress on the failure of the plaintiff to state that its alleged location was adopted by its board of directors, the statute, Section 3847, sub-sec. 3, prescribing adoption in that way. The allegation in the complaint is that the plaintiff corporation had "adopted" the location in question. Whether the location was adopted would, of course, be open to question on an answer denying it, but we think the demurrer must be held to have admitted the fact of its adoption and that to hold it was necessary to state that it was adopted by a vote of the board of directors, would be to require that evidence of the fact, instead of the fact itself, should be pleaded. *Sullivan, et al., v. The I. & S. Mining Co.*, 109 U. S., 550; *Bank of Metropolis v. Gutschlick*, 14 Pet., 27; *Delafield v. Kinney*, 24 Wendell, 345; *Arrington v. Savannah Ry. Co.*, 95 Ala., 434.

We conclude therefore that the facts well pleaded establish a vested interest in the plaintiff, sufficient to enable it to maintain the action.

The defendant claims, however, that the averments of
46 the complaint, in effect, show that the defendant and not the plaintiff is in possession of the portions of the plaintiff's

alleged location which are the subject matter of the controversy between them in this cause.

It is true there are some expressions in the complaint, which, taken by themselves, would give some countenance to that contention, but, taken as a whole, the complaint plainly declares that the plaintiff is the owner of the location surveyed and staked out by it on the ground and in possession of it but that such possession has been interfered with by wrongful acts on the part of the defendant, and is jeopardized by the threatened continuance of such acts.

The defendant further urges that the title to the portions of the plaintiff's alleged location now in question is by the complaint shown to be in dispute between the plaintiff and defendant, and that the former must therefore establish its title at law before it can have aid of a court of equity to protect it. We do not so interpret the complaint. We understand it to charge that the defendant having actual notice and knowledge of the plaintiff's interest and rights in the premises, is, unlawfully and without any claim of right, seeking to deprive it of them by a series of wrongful acts already begun and threatened to be continued up to the point of the complete ouster and dispossession of the plaintiff.

We come now to the question whether the plaintiff is, on the showing of facts in its complaint, entitled to the relief prayed for, or to any relief. It declares that the defendant is seeking to deprive it of its property, not by condemnation proceedings, or any process of law, but by repeated wrongful acts, which the defendant threatens to continue, and that unless relief in equity is granted a multiplicity of suits will result. Such, it seems to us, would be the natural and almost inevitable result.

The plaintiff also says it would suffer irreparable damage 47 by what the defendant is doing and threatens to do, with reference to its location. To this the defendant replies that plaintiff has alleged the feasibility of laying out other good locations between the points connected by the location in question here, and suggests that the plaintiff avail itself of that natural condition by taking another route and leaving to the defendant so much of the plaintiff's adopted location as it, the defendant, may care to use. That suggestion may in time commend itself to the plaintiff, but its present position in this cause is that its adopted location is the best possible one between the points referred to and that it asks the protection of this court against encroachments upon it by the defendant.

The defendant further contends that the plaintiff does not allege any damage, actual or threatened, which would be beyond money compensation, or the inability of the defendant to make such compensation.

It is true that all property is subject to be taken for the public use in the method and for the compensation provided by law, but we are not aware that any one is required to surrender his property to whomsoever may choose to lay violent hands on it, no matter how great the price or certainty of payment. The owner has the right to retain the property itself under such circumstances, and is entitled to the protection of the courts in so doing. Simmons Creek

Coal Co., v. Doran, 142 U. S., 417; Pittsburg S. & W. Ry. Co., v. Fiske, 123 Fed. 760; Southern Pacific Ry. Co., v. Oakland, 58 Fed. 50; Coatsworth v. Leigh Valley R. R. Co., 156 N. Y., 451.

We are, of course, now dealing with what may not be the actual facts, but which we must treat as actual and established, so far as they are well pleaded in the complaint, and we think that, unanswered, they are sufficient to establish the liability of the defendant and the right to the relief prayed for.

The case is therefore remanded to the District Court, for further proceedings in accordance with this decision.

48

IRA A. ABBOTT,
Associate Justice.

We concur:

WILLIAM J. MILLS, *C. J.*
FRANK W. PARKER, *A. J.*
WM. H. POPE, *A. J.*
EDWARD A. MANN, *A. J.*

McFie, J., Having heard the case below, did not participate in this decision.

Jan. 31st, 1906.

Endorsed: Filed in my office March 6, 1906, A. M. Bergere, Clerk.

In the District Court, Territory of New Mexico, County of San Juan.

THE ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO,
a Corporation, Plaintiff,

vs.

THE DENVER & RIO GRANDE RAILROAD COMPANY, a Corporation,
Defendant.

In Equity.

Answer.

This defendant, The Denver & Rio Grande Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of Colorado, and duly authorized to do business in the Territory of New Mexico, now and at all times hereafter saving and reserving unto itself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said complainant's bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as this defendant is advised is or are material or necessary for it to make answer unto, answering says:

1. That as to the allegations contained in the first numbered paragraph of said bill of complaint, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a

belief, and therefore demands strict proof of all and singular the matters and things in said paragraph set forth.

2. That as to the allegations contained in the second numbered paragraph of said bill of complaint, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, and therefore demands strict proof of the matters and things in said paragraph set forth.

3. That as to the allegations contained in the third numbered paragraph of said bill of complaint, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief and therefore demands strict proof of the matters and things in said paragraph set forth.

4. That as to the allegations contained in the fourth numbered paragraph of said bill of complaint, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, and therefore demands strict proof of the matters and things in said paragraph set forth.

5. That as to the allegations contained in the fifth numbered paragraph of said bill of complaint, this defendant admits that the plaintiff has employed civil engineers in running preliminary and experimental lines of survey from a point on the northern boundary of said County of San Juan to the town of Farmington in said county, and that it has expended certain sums of money in prosecuting said work, as to the amount of which this defendant has

50 neither knowledge or information sufficient upon which to base a belief, and further says that as to whether or not said plaintiff has complied with the laws of said Territory, or has filed in the office of the Secretary of said Territory a map or profile of any proposed line of railroad, or of the land required or taken for the use thereof, or of the boundaries of the several counties through which the same may run, or has made or filed such maps or any maps in the office of the Clerk of the County in which the alleged portions of such alleged road are located, or has in all things or to any extent whatever duly or otherwise complied with all or any of the laws of said Territory relating to and concerning the surveys, location and right-of-way of said alleged road, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, and therefore demands strict proof of all and singular the matters and things alleged in said paragraph.

Further answering the allegations contained in said paragraph numbered five, this defendant says that it is informed and believes, and upon information and belief alleges the fact to be that it never was and is not now the bona fide intention of said plaintiff to construct, maintain or operate a line of railroad between the northerly boundary of said County of San Juan and the said town of Farmington, and upon like information and belief further alleges that said plaintiff has not expended large or any sums of money in the construction of any railroad between said last named points speedily or otherwise.

6. As to whether or not the plaintiff has caused its alleged and

pretended line of road to be properly or otherwise surveyed and marked, or has fixed and determined the alignment, grade, contour or profiles thereof, with reference to the whole or any part of said alleged and pretended road, or has expended much or any time or money to make said alleged and pretended line and grade the

best possible or otherwise, for the purposes of a main line for the carriage of passengers or freight, or otherwise, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, and therefore demands strict proof of the matters and things herein referred to and alleged in said sixth paragraph.

This defendant denies that it is necessary that the alleged alignment and grades referred to in said sixth paragraph of said complaint be preserved or protected, and further denies that it is either material or necessary that said plaintiff be enabled without interference or otherwise, to construct or operate the said alleged and pretended road upon and in accordance with said alleged and pretended line and grades.

Further answering this defendant says that it is informed and believes, and upon information and belief alleges the fact to be that said plaintiff has at different points between the northerly boundary of San Juan County and the said town of Farmington run a number of preliminary and experimental lines and marked the same upon the ground, and that it was at all times, and is now impossible for this defendant or any person or corporation from said markings or from any public records or available sources of information to determine the alignment, grade or location of said plaintiff's alleged and pretended line of road, or of any part thereof.

7. As to whether or not the plaintiff's alleged and pretended road when constructed, if ever constructed, will be a main line connecting populous centers, or frequent trains will pass daily over the same, this defendant says that it has neither knowledge or information sufficient upon which to base a belief, and therefore demands strict proof of the matters and things above referred to in said paragraph numbered seven of said complaint.

Further answering this defendant denies that any change, or that numerous changes in the line or lines and grade or grades adopted by the plaintiff for the construction of said alleged and pretended road, if any line or grade has in fact been adopted, will materially or at all impair or interfere with the capacity or efficiency of said alleged and pretended line of road, or will increase the danger and hazard of the operation thereof, either to the plaintiff or to its passengers or the public.

Further answering this defendant says that it is informed and believes, and upon information alleges the fact to be that the line and grade adopted by the plaintiff, if any line or grade has been adopted, is impossible of construction and operation in consequence of frequent and extreme curvatures and heavy grades, and that the elimination of the alleged crossings of its line would result to the plaintiff in a straighter alignment and easier grades and increased

capacity and efficiency of any line that may be built thereon, and a diminution of the dangers and hazards of operation thereon.

8. As to whether or not the plaintiff has in the examination of and location of its alleged and pretended line, and in securing rights-of-way therefor, in good faith or otherwise, laid out and expended more than one hundred thousand dollars, this defendant says that it has not and cannot obtain sufficient knowledge or information upon which to base a belief, but upon information and belief denies that said plaintiff has expended one hundred thousand dollars, or any considerable fraction thereof in the examination and location of said alleged and pretended line and in securing rights-of-way between the northerly boundary of said San Juan County and said town of Farmington.

Further answering this defendant denies that said plaintiff has expended any sum of money whatever in the construction of any line of railroad between said northerly boundary of San Juan County and said town of Farmington, and denies that it has done or performed any work of construction whatever thereon, and further

denies that said plaintiff has exercised due diligence or any
53 diligence whatever in the prosecution of its alleged and pretended plans.

9. As to whether or not said plaintiff has surveyed, located, staked and marked on the ground its alleged and pretended line of road between the northerly boundary of said San Juan County and said town of Farmington, and across the particular subdivisions of land in said paragraph described, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, and further says that it is informed and believes, and upon information and belief alleges the fact to be that said plaintiff has at various points and across the subdivisions of land in said paragraph described, run and marked two or more alleged and pretended lines of road, as to which it was and is impossible for this defendant or for any other person or corporation to determine whether or not such alleged and pretended lines or any of them was or were intended to be definite or permanent or otherwise.

10. As to the truth or falsity of the allegations contained in the tenth numbered paragraph of said bill of complaint, this defendant says that it has neither knowledge or information sufficient upon which to base a belief, and therefore denies the same.

11. As to whether or not the plaintiff has been able to agree or has agreed with each and every or any of the owners of each and every or any of the parcels of land described in paragraph nine of said complaint, upon the compensation to be paid for the taking and use of a right-of-way upon, over and across said lands or any of them, and as to whether or not each and every or any of the owners of said lands executed agreements or instruments in writing duly acknowledged or otherwise, whereby they and each or any of them have or did severally or otherwise agree to convey to the plaintiff for the purposes of said alleged and pretended road, or
54 otherwise, any part of said lands located or otherwise, as aforesaid, for a consideration and upon terms, or for any con-

sideration or upon any terms in said instruments referred to, or any instruments of writing, this defendant has neither knowledge or information sufficient upon which to base a belief.

Further answering this defendant denies that due notice or any notice, legal or otherwise, obligatory or binding upon this defendant, in writing or otherwise, of the existence of each and every or any of said instruments and agreements in said paragraph eleven referred to was given or duly filed for record or recorded in the office of the Clerk of San Juan County, or elsewhere, prior to the acts of the defendant in said paragraph referred to, or at any other time or place.

Further answering this defendant denies that any such notice as is referred to in said eleventh paragraph of said complaint if executed, filed and recorded as alleged in said complaint, was due or legal notice of the existence of or the contents or effect of any instrument or agreement affecting or intending to affect the lands described or any part thereof, and further answering denies that at the time of the institution of this action, any instrument or instruments of conveyance affecting the lands described in paragraph nine of said complaint was or were of record in the office of the Clerk of said San Juan County, or that this defendant had any legal notice thereof, or that said alleged agreements or any of them was or were or are of any force, effect or validity whatever as to this defendant.

12. This defendant denies that said plaintiff, by virtue of its alleged surveys, locations and files, or any of them, or by virtue of its alleged compliance with the laws of said Territory, or by virtue of any agreement or agreements, or the laws of said Territory, became or was or is at the times in said complaint mentioned, or at any time vested with or that it had or has as to this defendant the first prior right or any right to take, use or occupy for public purposes,

55 or the purposes of its alleged line of road, or for any purpose, the lands described in said ninth paragraph of said complaint, across or upon the line of route adopted and appropriated by this defendant, and upon which this defendant at the time of the institution of this action had constructed its said line of road, and further denies that said plaintiff, by its said pretended action, or by any action by it performed or done, appropriated or acquired any right to appropriate or to use said lands where the same conflicted to any extent with the right-of-way surveyed, located and appropriated by this defendant.

13. This amendment denies each and every allegation in the thirteenth numbered paragraph of said complaint contained, and in each and every part thereof.

14. As to whether or not the defendant's said line of road as surveyed, laid out, constructed and projected is located with reference to the pretended line of the plaintiff, as in the fourteenth numbered paragraph of said complaint alleged, this defendant says that it has neither knowledge or information sufficient upon which to base a belief, but admits that its said line is surveyed, constructed and projected down the valley of the Animas river, in a general

southerly direction from the north boundary of San Juan County to the said Town of Farmington.

This defendant further admits that the topography of the country between the north boundary of said County of San Juan and the said town of Farmington is such that it would not be impossible to construct two lines of railroad down the valley of said Animas river between said points, and further says that its said line of railroad, so located as aforesaid, is located with a view to securing the straightest possible line between said points with the least possible grades, and that if its said line so located as aforesaid encroaches at any points upon the right-of-way desired but not acquired
56 by said plaintiff, such encroachments are the results of natural topographical conditions, and not a desire on the part of this defendant to harass, annoy or inconvenience said plaintiff.

Further answering this defendant denies that in the location and construction of its said line of road, it has taken, used or occupied any part of said plaintiff's right-of-way.

15. This defendant denies that it has with full notice and knowledge, or otherwise, entered upon, laid out, surveyed, staked and marked on the ground its line of railroad, route and right-of-way over or across any right-of-way acquired or being the property of said plaintiff, or that it has attempted to take or taken or used, or that it proposes to take, occupy or use for the purpose of the construction, the maintenance and operation of a railroad or otherwise, any part or portion of any right-of-way or lands appropriated or acquired by said plaintiff for the maintenance and operation of a railroad, or otherwise, and further denies that said plaintiff did by location, adoption or otherwise acquire or become entitled to as against this defendant any part of the right of way, lines and premises in said paragraph described.

Further answering this defendant says that as to whether or not it has crossed the line of route surveyed by said plaintiff, it has neither knowledge or information sufficient upon which to base a belief, and that if it has done so, it has done so with full right and under lawful authority.

16. This defendant denies that its line of road as surveyed, staked, marked on the ground or constructed unnecessarily crosses or recrosses the line of route surveyed by said plaintiff, or any part thereof, at the points or places in said sixteenth paragraph of said complaint described, or any of them, or elsewhere, or that it wrong-
57 fully encroaches upon or occupies a large portion or any portion of said alleged line, and alleged right-of-way, and denies that said plaintiff has acquired or held, or now holds for right-of-way purposes, or any other purpose, any of said lands and premises described.

17. This defendant further denies that it has ignored the grades and profiles alleged to have been adopted by the plaintiff for its alleged line of road, and denies that it possessed any knowledge, or that it was able to acquire any information with reference to said alleged grades and profiles, but admits that it has already constructed and proposes and intends to continue the construction of a railroad

upon the surveys, lines and grades established by it, but denies that such construction will interfere to any extent whatever with the property and rights of said plaintiff, and denies that its grades and profiles are arbitrarily fixed or fixed otherwise than with reference to the topographical features of the country over which it is proposed to construct and complete its said line of road.

18. This defendant denies each and every allegation in the eighteenth numbered paragraph of said complaint contained and in each and every part thereof.

19. As to the allegations contained in the nineteenth numbered paragraph of said complaint, this defendant says that it has not and cannot obtain sufficient knowledge or information upon which to base a belief, and therefore denies the same.

20. This defendant denies each and every allegation contained in the twentieth numbered paragraph of said complaint, and in each and every part thereof.

21. This defendant denies each and every allegation contained in the twenty-first numbered paragraph of said complaint, and in each and every part thereof.

22. This defendant denies each and every allegation in the twenty-second numbered paragraph of said complaint contained, and

58 in each and every part thereof.

23. This defendant admits that it claims the right to construct, maintain and operate its railroad along the line and grade surveyed and established by it, and for this purpose it is and for a long time past has been actively engaged with a large force of men in the construction of its said road, upon said line and grade, and alleges that it has full right and lawful authority so to do, and further admits that it proposes to proceed with such construction and to complete its said proposed road between the town of Durango, in the State of Colorado, and said town of Farmington, in the Territory of New Mexico, but denies that it proposes or threatens to commit repeated and innumerable or any trespasses upon the rights, premises or property of said plaintiff, and denies that the construction of its said railroad as proposed will be a continuing or any trespass upon plaintiff's rights, premises or property, or that it will work great and irreparable injury or any injury whatever to the plaintiff, or that it will destroy or in any wise impair the plaintiff's rights in the premises.

24. This defendant denies each and every allegation in the twenty-fourth numbered paragraph in said complaint contained, and in each and every part thereof.

25. This defendant denies each and every allegation contained in the twenty-fifth numbered paragraph of said complaint, and in each and every part thereof.

Second 25. This defendant denies each and every allegation in the second twenty-fifth numbered paragraph in said complaint contained, and in each and every part thereof.

26. This defendant alleges that it has fully complied with

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the laws of the Territory of New Mexico with relation to the construction and operation of railroads, and that it has full

and lawful authority to proceed, lay out, construct, maintain and operate its proposed road, and that all and every of its acts and doings in the premises were and are with full legal authority therefor, and that it has full right, and lawful authority to construct, maintain and operate its said proposed road.

Further answering this defendant admits that it never has secured the consent of the plaintiff for any of its acts or doings and that it has not instituted any proceedings in any court against said plaintiff under the right of eminent domain for condemnation or otherwise, and that it has not agreed with the plaintiff upon any terms or conditions with reference to entering sections or crossings of the plaintiff's alleged line, or for any compensation therefor, but denies that the plaintiff prior to the institution of this action possessed any lands, premises or rights as to which it was legally necessary for this defendant to secure the consent of said plaintiff, or to enter into agreements with it or to institute condemnation proceedings.

This defendant further admits that at the time of the institution of this action it had already acquired by purchase much of the right of way required by it for the construction of its said proposed line, and at the time of the institution of this action this defendant was about to proceed against the owners of certain lands required for its said right of way under the laws of eminent domain of the Territory of New Mexico, for the purpose of condemning the same, and without notice to said plaintiff, but denies that such action was taken or proposed with full knowledge or any knowledge of any right, title or interest to said lands, premises and right of way in said plaintiff, and further denies that said plaintiff possessed any right, title or interest in or to said lands, premises and right of way, or any
60 part thereof, which it was necessary to procure or condemn, and further says that but for the institution of this suit this defendant would have continued to acquire and would have acquired unacquired portions of the right of way desired by it for said line of railroad.

Further answering this defendant denies that said plaintiff possessed any right, title or interest in and to the lands and right of way aforesaid, which it was necessary or possible for this defendant to condemn or acquire, by virtue of the laws of eminent domain, or that the legal rights of said plaintiff would have been in any manner infringed by such action on the part of the defendant, and further denies that great or irreparable or any damage or injury would have been sustained by the plaintiff, but for the restraining order of this Court, but on the contrary alleges that this defendant has at all times proceeded strictly within its legal rights and in accordance with law.

A. Further answering this defendant says that The Denver and Rio Grande Railroad Company was incorporated on or about July 14, 1886, under and by virtue of the laws of the State of Colorado, for the purpose, amongst other things, of constructing, operating and maintaining various lines of railroad within the State of Colorado and the Territory of New Mexico, and amongst others, the following, to-wit:

Commencing at or near the junction of the Dallas with the Uncompaghre, in the County of Gunnison, and extending along the valley of the Dallas to the summit of the divide between the waters of the Uncompaghre and the waters of the San Miguel; thence by the most practicable route to the valley of the San Miguel; thence up the valley of the San Miguel and along its tributaries and near the Fish Lakes, to the divide between the waters of the San Miguel and the waters of the Dolores; thence following the valley of the Dolores

61 to a point at or near the town of Rico; thence along the valley of the Dolores and around the mountains to a point at or near the town of Durango in the valley of the Las Animas River; thence down the valley of the Las Animas River to its junction with the valley of the San Juan; thence in a general southerly direction to the southern boundary of the Territory of New Mexico, all as shown in the articles of incorporation of said Company, a copy of which is attached hereto and marked Exhibit "A."

B. That this defendant has fully complied with all and singular the requirements of the Territory of New Mexico with reference to the location, construction and operation of railroads, and is duly authorized and fully and legally empowered to proceed with the construction, operation and maintenance thereof in said Territory.

That many months ago, and on or about the 11th day of November, A. D., 1904, this defendant, in accordance with the powers and privileges vested in it and in accordance with the provisions of its articles of incorporation, entered upon the location and construction of a line of railroad from said town of Durango, in the State of Colorado, down the valley of the Las Animas River to and past the town of Farmington, in the County of San Juan and Territory of New Mexico, and to the junction of said Las Animas River with said San Juan River, and that in the prosecution of and for the purpose of carrying out this enterprise, and the construction of said line, this defendant acquired by purchase and otherwise, much the greater part of the right of way required therefor, but that as to some portions thereof this defendant was unable to agree with the owners of lands required upon the compensation to be paid therefor, and thereupon was compelled to and did institute condemnation proceedings under the eminent domain law of the Territory of New Mexico, for the purpose of acquiring such lands, and right of way, and at the

62 time of the institution of this suit had completed its preparations and was about to institute further condemnation proceedings for the purpose aforesaid, making and intending to make any and all persons and corporations possessing or claiming any right, title or interest in or to such lands, premises and right of way, parties defendant thereto, until it was restrained from proceeding further therein, both in suits instituted and others about to be instituted, by the order of this Honorable Court.

C. This defendant further says that during the time aforesaid and prior to the institution of this suit, this defendant had fully completed the location of its line, as described in its said articles of incorporation, between said Durango and said Farmington, and had

entered with a large force of men upon the construction of said line and had constructed many miles thereof when restrained from further prosecuting said work by the order of this Honorable Court.

D. This defendant further says that as to the northeast quarter (n. e. $\frac{1}{4}$) of Section 33, Township 32, north of Range 10, west, referred to in paragraph nine of the plaintiff's bill, and heretofore owned by one W. H. Whitney and wife, this defendant on or about February 10th, 1905, obtained from said W. H. Whitney and wife an agreement to sell to this defendant, and an option for purchase by this defendant of right-of-way one hundred feet wide along and upon said line, a copy of which is attached hereto and marked Exhibit B, and that thereafter, and on to-wit, the 3rd day of March, 1905, said W. H. Whitney and wife conveyed to this defendant by deed duly acknowledged and recorded, a copy of which is hereto attached and marked Exhibit B-1, right-of-way one hundred feet wide across said northeast quarter of said Section 33, along and upon said line so located by this defendant as aforesaid, and that at the time of the purchase and sale aforesaid, there was no record evidence in the said County of San Juan of any right, title, claim

or interest in or to any part or portion of said lands, premises and right-of-way so purchased as aforesaid in said plaintiff or any other person or corporation whatsoever, except said Whitney, and that if said plaintiff at that time possessed any right, title or interest in or to said land and right-of-way so purchased by this defendant as aforesaid, such title was not disclosed by the records of said County, and this defendant was and is an innocent purchaser of such lands, premises and right-of-way without notice, and was and is by virtue of purchase and ownership as aforesaid, fully authorized and legally entitled to construct and operate its railroad over, upon and along said right-of-way so purchased as aforesaid, without let or hindrance from said plaintiff or any other person or corporation whatsoever, and that this defendant is the sole owner thereof.

E. This defendant further says that as to the southeast quarter (s. e. $\frac{1}{4}$) of Section 5, Township 31, north of Range 10, west, referred to in paragraph nine of the plaintiff's bill, and formerly owned by one W. W. McEwen, this defendant on or about March 6th, 1905, obtained from said W. W. McEwen an agreement to sell to this defendant, and an option for purchase by this defendant of right of way one hundred feet wide along and upon said line, a copy of which is attached hereto and marked exhibit "C," and that thereafter, and on to-wit, the 1st day of April, 1905, said W. W. McEwen conveyed to this defendant by deed duly acknowledged and recorded, a copy of which is hereto attached and marked exhibit "C-1" right of way one hundred feet wide across said southeast quarter of said Section 5, along and upon said line so located by this defendant as aforesaid, and that at the time of the purchase and sale aforesaid, there was no record evidence in the said County of San Juan of any right, title, claim or interest in or to any part of portion of said lands, premises and right of way so purchased as afore-

64 said in said plaintiff or any other person or corporation whatsoever, except said McEwen, and that if said plaintiff at that time possessed any right, title or interest in or to said land and right of way so purchased by this defendant as aforesaid, such title was not disclosed by the records of said County, and this defendant was and is an innocent purchaser of such lands, premises and right of way without notice, and was and is by virtue of purchase and ownership as aforesaid, fully authorized and legally entitled to construct and operate its railroad over, upon and along said right of way so purchased as aforesaid, without let or hindrance from said plaintiff or any other person or corporation whatsoever, and that this defendant is the sole owner thereof.

F. This defendant further says that as to the west half of the southeast quarter (W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$) and the southeast quarter of the southwest quarter (S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$) of Section 18, Township 30 North of Range 11 West, referred to in paragraph nine of the plaintiff's bill, and formerly owned by one Edith B. M. Young, this defendant as early as April 6th, 1905, attempted by purchase to secure a right of way one hundred feet wide thereover, at which time this defendant was notified that said Edith B. M. Young, owner as aforesaid, was at Alma, in the State of Colorado, and thereafter, and upon being unable to agree with said owner upon the compensation to be paid to her for the lands and right of way required across said portions of said Section 18, and prior to May 13th, 1905, condemnation suit was brought by this defendant in the District Court in and for the County of San Juan and Territory of New Mexico, and summons was duly issued and made returnable on May 13th, 1905, and prior to the institution of this suit, and prior to the recording of any conveyance from said Edith B. M. Young to the plaintiff herein; that appraisers were subsequently appointed by said court in accordance with the laws of said Territory and that said condemnation proceeding would have been diligently
65 prosecuted to final judgment in favor of this defendant but for the restraining order of this Honorable Court herein, and that neither at the time of the institution of said condemnation proceeding by this defendant, or at any time prior to the 13th day of May, 1905, was this defendant in any manner advised of any right, title, interest or claim in and to the right of way described in this defendant's petition in condemnation, in this plaintiff or any other person or corporation, except the said Edith B. M. Young, and this defendant further says that it is informed and believes, and upon information and belief states the fact to be that neither at the time of the institution of said condemnation suit or at the time of the issuance of the summons therein, was said plaintiff possessed of or entitled to any right, title or interest in and to said right of way or any part thereof, and this defendant further says that it is informed and believes, and upon information and belief states the fact to be that plaintiff herein at some time subsequent to the institution of said condemnation suit, taking advantage of the restraint imposed upon this defendant by this Honorable Court herein, secured the execution by said Edith B. M. Young of a deed or

other conveyance to it of right of way across said portions of said Section 18, and in order to show priority of right to and precedence in title over this defendant for said lands said deed so obtained as aforesaid was dated back and does not disclose the real date on which said conveyance was executed.

G. This defendant further says that as to the southeast quarter (S. E. $\frac{1}{4}$) of Section 1, Township 29 North of Range 13 West, referred to in paragraph nine of said complaint, and formerly owned by T. R. Bouseman and wife, this defendant on or about May 11th, 1905, obtained from said Thomas R. Bouseman and Lucy N. Bouseman an agreement to sell to this defendant, and an option for purchase by this defendant of right of way one hundred feet wide along and upon said line, a copy of which is attached hereto and marked Exhibit "D," and that thereafter, and on to-wit, the — day of May, 1905, said T. R. Bouseman and wife conveyed to this defendant by deed duly acknowledged and recorded, right of way one hundred feet wide across said southeast quarter of Section 1, along and upon said line so located by this defendant as aforesaid, and that at the time of the purchase and sale aforesaid, there was no record evidence in the said County of San Juan of any right, title, claim or interest in or to any part or portion of said lands, premises and right of any way so purchased as aforesaid, in said plaintiff or any other person or corporation whatsoever except said Bouseman, and that if said plaintiff at that time possessed any right, title or interest in or to said land and right of way so purchased by this defendant as aforesaid, such title was not disclosed by the records of said County, and this defendant was and is an innocent purchaser of such lands, premises and right of way without notice, and was and is by virtue of purchase and ownership as aforesaid, fully authorized and legally entitled to construct and operate its railroad over, upon and along said right of way so purchased as aforesaid, without let or hindrance from said plaintiff or any other person or corporation whatsoever, and that this defendant is the sole owner thereof.

H. This defendant further says that as to the remaining tracts of lands and conflicts described in said complaint, said plaintiff at the time of the institution of this suit possessed no record title thereto, or any right, title or interest therein which this defendant was under any legal obligation to recognize or respect, or as to which this defendant possessed any knowledge or information whatever, and that but for the restraining order of this Court entered herein, this defendant would have proceeded to secure by purchase, condemnation or otherwise title to such lands and right of way as it required for the construction of its line as described in its articles of incorporation and along the line surveyed and located by it.

I. This defendant further says that by virtue of the acts and doings aforesaid, this defendant at the time of the institution of this suit was and now is justly entitled to and possessed of a prior right to the possession of the lands, premises and right of way particularly described in said complaint, at the points where plaintiff's

alleged line is said to cross or interfere with the line and road constructed and projected by this defendant, and that by reason of the restraint imposed upon this defendant by this Honorable Court, it has been greatly hindered and delayed in the construction of its said road and put to great expense, and that the public has been greatly injured and damaged by reason of the delay in the construction of said road, in consequence of such restraint, and further says that it has at all times acted and proceeded in good faith in the location of its said line of road and the acquisition of right of way therefor in the construction of its said road, with a view to and for the purpose of constructing with the least possible delay the best and most available line of railroad between the points hereinbefore mentioned, for the purpose of serving the public as a common carrier at the earliest possible moment, and as efficiently as may be in view of the topographical features of the country over which said line is located, and with no intention whatever of either annoying, harassing or inconveniencing said plaintiff, and that the construction of this defendant's line as projected will not prevent the construction of the plaintiff's line or seriously interfere therewith, and that any changes that might be necessary in the plaintiff's line to avoid the crossings and conflicts referred to would not result to the disadvantage of said plaintiff, but on the contrary would result in and tend to produce a straighter and more available and practicable line of railroad between said points.

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J. This defendant further alleges that at this time this defendant is in possession of the lands and premises in controversy between the plaintiff and this defendant, with full right thereunto, and that this defendant long since acquired, by purchase and by condemnation, the title to said lands and premises, and that this defendant has constructed, completed, equipped and since on or about the 22nd day of September, 1905, has had in full operation, for the benefit of the public, a line of railroad down the valley of the Las Animas River between the Northerly boundary of San Juan County and the town of Farmington, therein and upon over and across the lands and premises in controversy, and that thereby this defendant has been able to and has, as a common carrier of freight and passengers, conferred great and lasting and inestimable benefits and advantages upon the public, and particularly upon the inhabitants of said San Juan County. And this defendant further says that it is informed and believes, and upon information and belief alleges the fact to be, that up to this time said plaintiff has not acquired or sought, or attempted to acquire, right of way for its alleged line of route in conflict with this defendant's line of route, and that said plaintiff has not constructed or attempted to construct, a line of railroad in said San Juan County, or elsewhere, in the Territory of New Mexico, and that said plaintiff does not intend to construct a line of railroad along or upon the line of route described in its said bill, and that said plaintiff has suffered no damages whatever by reason of the construction and operation by this defendant of its said railroad, and by its failure and refusal to acquire, or to attempt to acquire, right of way for its alleged line of route, and its

failure to construct or to attempt to construct a railroad in said County, said plaintiff is estopped to deny the rights of this defendant and to claim or recover damages of this defendant by reason of the construction by it of a railroad along, upon and across the lands and premises in controversy between the parties hereto.

Wherefore having fully answered, this defendant prays that this action may be dismissed at the cost of the plaintiff, and that this defendant may recover its costs expended herein and for such further and additional relief as this defendant may be found to be justly entitled to, and as to this court shall seem meet.

_____,
_____,
Attorneys for Defendant.

TERRITORY OF NEW MEXICO.

County of Santa Fe, ss:

E. C. Abbott, of lawful age, being first duly sworn, deposes and says: That he is one of the attorneys for the Denver & Rio Grande Railroad Company, defendant in the above-entitled cause, and as such makes this verification, that he has read and knows the contents of the foregoing answer, and that matters and things herein set forth are true, except as to those matters stated on information and belief, and as to those matters he believes them to be true.

E. C. ABBOTT.

Subscribed and sworn to before me this 19th day of April, A. D. 1906.

[SEAL.]

A. M. BERGERE.

Clerk of District Court.

EXHIBIT "A."

The Denver & Rio Grande Railroad Company.

Articles of Incorporation.

Know all men by these presents, That we, the undersigned, George Coppel, Arnold Marcus, and Robert B. Minturn, of the City, County and State of New York; Theodore H. A. Tromp, of The Hague, Kingdom of Holland; John J. Stadiger, of the City and County of Philadelphia, and State of Pennsylvania, and William S. Jackson, and David H. Moffat, both residents of the State of Colorado, desiring to associate ourselves together, under and in pursuance of the provisions of the laws of the State of Colorado, relating to the formation of corporations, to form a company for the purpose of carrying on the certain lawful business particularly named in these articles, including the acquirement and purchase of certain railway property and franchises and the construction and operation of certain lines of railroad and telegraph within and without the limits of the said State of Colo-

rado, all of which is hereafter fully set forth,—do make, sign and acknowledge these, our original articles of incorporation, and we do state, declare and specify as follows, to-wit:

First.

That the corporate name of said company shall be The Denver and Rio Grande Railroad Company.

Second.

That the said company is created for the objects and purposes hereinafter specified, as follows, to-wit:

To acquire and purchase, maintain, operate, extend and complete the property and franchises formerly The Denver and Rio Grande Railway Company, sold and conveyed to George Coppel, Arnold Marcus, Robert B. Minturn, Theodore H. A. Tromp and John J. Stadiger, Purchasing Committee, under and by virtue of a certain decree of the Circuit Court of the United States for the District of Colorado, entered on the fifth day of May, A. D., 1886, in a certain suit wherein Charles F. Woerishoffer and Frederick G. Renner were the then complainants, and The Denver and Rio Grande Railway Company and others were defendants, numbered 1,572 in Equity;

and also, under and by virtue of the power of sale contained
71 in a deed of trust or mortgage made, executed and delivered by the said The Denver and Rio Grande Railway Company, under date of January first, A. D., 1880, to Louis H. Meyer and John A. Stewart, Trustees; and to take, hold, exercise and enjoy, all the estate, franchises, rights, powers and privileges, claim or demand, in law or in equity, of the said The Denver and Rio Grande Railway Company, whose property and franchises were sold and conveyed as aforesaid; to build, construct, complete, equip, manage, operate and maintain certain other lines of railroad as herein set forth; to purchase, construct and operate a line, or lines, of telegraph in connection with said railroad already constructed and hereafter to be built; and to establish, maintain and conduct an express business in, along and upon said lines of railway, and any other lines of railway, or lines of stages connecting therewith; to purchase, acquire, own, hold and dispose of stock and bonds of other railroad or construction companies in the said State of Colorado, or elsewhere, and to purchase, acquire, own, hold manage and operate, by lease, consolidation or otherwise, other railroads situated within or without said State of Colorado whenever and as thereunto duly authorized by law; to purchase, take, receive and hold, or sell, in furtherance of the objects and purposes for which said company is formed, any governmental, state or municipal bonds, obligations, or the bonds or securities of other companies, associations or corporations, with power to endorse or guarantee the payment thereof, or of other parties, associations, companies or corporations; to purchase, take and hold, sell and convey, real property, agricultural, timber, mineral and other lands, coal and other mines, deposits and quarries and other property along, upon or adjacent to the route of any of the

railroads owned or operated by said company, and if deemed useful for the promotion of its interests, lease, use, operate, manage and control any such lands, mines, deposits, quarries and other property.

Said company shall also have the power to borrow money and execute and issue its notes, bonds or other securities therefor, and to mortgage its property and franchises as security for such bonds or other obligations, and shall have and exercise such incidental and necessary powers in addition to those herein named as shall be necessary, requisite or proper to effectuate and accomplish the objects and purposes aforesaid.

Third.

The railroad of this company, to be acquired as aforesaid, as already constructed, extends from the city of Denver southward via Acequia, Sedalia, Castle Rock, Douglass and Colorado Springs to South Pueblo on the Arkansas River, thence still southerly via Cuchara to El Moro and the El Moro collieries; also from Cuchara westward via Placer and Garland to Alamosa on the Rio Grande Del Norte, thence southward via Antonio in Colorado and Chamita in the Territory of New Mexico to Espanola in said last-mentioned territory, and from Antonito, westward, via Chama in New Mexico to Durango in Colorado, and thence northward to Silverton, in San Juan County, Colorado, with branches as follows: from near Sedalia aforesaid to the Cannon coal mines on Plum creek, from Castle Rock and Douglas aforesaid to the stone quarries, from Colorado Springs to Manitou, from the depot at South Pueblo to Bessemer, with side tracks at Bessemer, from El Moro to the coking works and coal mines of the Colorado Coal and Iron Company, from Placer to the Placer iron mine, from Alamosa westward, via Del Norte to Wagon Wheel Gap, and from Durango to the San Juan smelting works, and from Silverton to the Silverton smelter; and also from South Pueblo, westward and northward, up the valley of the Arkansas river via Labran, Canon City, Grape Creek Junction, Salida, Hecla and Malta to Leadville, thence to Frisco and Dillon, with branches from a point

at or near Labran, up Coal, Oak and Chandler creeks to the coal mines, from Grape Creek Junction to West Cliff in the Wet Mountain valley, from Hecla to Calumet, and from Malta via Red Cliff to Rock creek and from Leadville to various mines and smelting works, including the Leadville Iron-Silver mine, 10.4 miles; also from Salida via Poncha, Mears, Gunnison, Sapinero and Montrose to a point on the western boundary line of the State of Colorado, where connection is made with the Denver & Rio Grande Western Railway, with branches from Poncha to Maysville, and thence to Monarch, from Mears to Hot Springs, from Gunnison to Crested Butte and the anthracite coal mines with a spur up Taylor river; and in addition about four hundred and twenty miles of railway heretofore projected, surveyed, located and partly constructed or partly located from and to the points and on or along the routes as follows: from a point at or near Acequia aforesaid up the valley of the South Platte river into the South Park, and thence to a con-

nection with the line from Canon City to Leadville; through the Ute Pass from Manitou towards the Platte river near Florissant, from Frisco aforesaid to Breckenridge; from Dillon aforesaid down the valley of the Blue river to its junction with the Grand river and into Gore's canon with a branch up the valley of the Muddy river to Muddy pass, up the Snake river from its mouth towards Montezuma; from Rock creek aforesaid to Defiance City; from points on the line between Mears and Hot Springs aforesaid to Bonanza and Saguache, and thence to a connection with its said line from Cuchara westward at a point on said line between Garland and Del Norte; from Sapinero aforesaid to Lake City; from Silverton to Eureka; from Montrose aforesaid to Ouray; from Wagon Wheel Gap to Antelope Springs; from Silverton aforesaid to the Red Mountain mines; from Chamita aforesaid up the valley of the Chama river to Chama aforesaid; and from Espanola aforesaid to Albuquerque in New Mexico.

And its railroad shall be further constructed:

74 1. Commencing at or near the junction of Rock Creek with the Eagle River, in the county of Eagle, and extending thence down the valley of the Eagle to its junction with the valley of the Grand; thence along the valley of the Grand to its junction with the Gunnison; thence by the most practicable route in a general westerly direction to the western border of Colorado.

2. Commencing at or near the junction of Roaring Fork Creek with the Grand River, in the county of Garfield, and extending up the valley of the Roaring Fork Creek to the town of Aspen; thence following the valley of Castle Creek and its tributaries to the summit of the Elk Mountains; thence down the valley of the Taylor River to a point at or near the mouth of the Slate River in the county of Gunnison.

3. Commencing at or near the junction of Rock Creek with the Roaring Fork Creek, in Garfield county; thence by the most practicable route along the valley of Rock Creek and through the canons of the same to the summit of the range dividing the waters of the Grand River from the waters of the Gunnison River; thence by the most practicable route to the town of Crested Butte, or a point in the valley of the Gunnison River at or near the mouth of Ohio Creek.

4. Commencing at or near the junction of Thompson Creek with Rock Creek, in the county of Pitkin, thence up Thompson Creek to the forks thereof; thence up the north fork of Thompson Creek to its source.

5. Commencing at or near the forks of Thompson Creek, referred to above, in the county of Pitkin, and extending thence up the middle fork of said Thompson Creek to its source.

6. Commencing at or near the junction of the middle fork of Thompson Creek and the east or south fork of Thompson Creek, in the county of Pitkin, and extending thence up the east or south fork of Thompson Creek to its source.

7. Commencing at or near the junction of Coal Creek with Rock Creek in the county of Pitkin, and extending thence up the valley of Coal Creek to its source.

8. Commencing at or near the junction of Four Mile Creek with

Roaring Fork Creek, and extending thence up Four Mile Creek to its source.

9. Commencing at or near the junction of Minnequa or South Canon Creek with the Grand River, and extending thence up said Minnequa or South Canon Creek to its source.

10. Commencing at or near the junction of Rifle Creek with the Grand River in the county of Garfield and extending thence up the valley of said Rifle Creek and in a general northerly direction to the summit of the divide between the Grand River and the White River; thence by the most practicable route to the valley of White River at or near the town of Meeker; thence by the most practicable route in a general northerly direction to the summit of the divide between the White River and the Yampa River; thence by the most practicable route in a general northerly direction to the northern boundary of the State of Colorado.

11. Commencing at or near the junction of Elk Creek with the Grand River and thence along the valley of Elk Creek to the Carbonate Mining district.

12. Commencing at or near the mouth of the Lake Fork of the Gunnison, in the county of Gunnison, and extending along the valley of the Lake Fork to the town of Lake City; thence by the most practicable route across the range dividing the waters of the Gunnison from the waters of the Rio Grande to a point in the valley of the Rio Grande in the neighborhood of Antelope Park.

13. Commencing at or near the junction of Henson Creek and the Lake Fork of the Gunnison, in the county of Hinsdale, and extending up Henson Creek to Rose's cabin; thence by the most practicable route to Mineral Point, situated on the divide between the waters of Henson Creek and the waters of Las Animas River.

14. Commencing at or near the town of Montrose, in the county of Montrose, and extending up the valley of the Uncompaghere River to the town of Ouray.

15. Commencing at or near the junction of the Dallas with the Uncompaghere, in the county of Gunnison, and extending along the valley of the Dallas to the summit of the divide between the waters of the Uncompaghere and the waters of the San Miguel, thence by the most practicable route to the valley of the San Miguel, thence up the valley of the San Miguel and along its tributaries, and near the Fish Lakes to the divide between the waters of the San Miguel and the waters of the Dolores; thence following the valley of the Dolores to a point at or near the town of Rico; thence along the valley of the Dolores and around the mountains, by such route as upon detailed surveys may prove the most practicable, to a point at or near the town of Durango, in the valley of Las Animas River; thence down the valley of Las Animas River to its junction with the valley of the San Juan; thence in a general southerly direction to the southern boundary of the State of Colorado.

16. Commencing at or near the town of Espanola, and extending thence by the most practicable route and in a general southerly direction to the town of Santa Fe.

77 17. Commencing at or near the town of Espanola, and extending in a southerly direction along the valley of the Rio Grande to the town of Albuquerque; thence in a general southerly direction to the town of El Paso Del Norte.

18. Commencing at or near the town of Dillon, in the valley of the Blue, thence extending down the valley of the Blue to its junction with the valley of the Grand; thence along the valley of the Grand and through Gore's Canon to the mouth of Egeria Creek; thence up the valley of Egeria Creek to the summit of the divide between the valley of the Grand and the valley of the Yampa; thence by the most practicable route to the valley of the Yampa; thence, following the valley of Yampa, to the western border of the State of Colorado.

19. Commencing at or near the junction of Muddy Creek with the Grand River, and extending thence along the valley and slopes of Muddy Creek and its tributaries to Muddy Pass; situated in the divide between the Middle Park and North Park; thence in a general northerly direction to the northern boundary of the State of Colorado.

20. Commencing at a point in the valley of the White River at or near the town of Meeker, and extending in a general westerly direction along the valley of the White River to the western boundary of the State of Colorado.

22. Commencing at or near the town of Wagon Wheel Gap, and extending up the valley of the Rio Grande to Cunningham Pass.

23. Commencing at or near the junction of Wimenuche Creek and the Rio Grande, and extending along the valley of the Wimenuche and the slopes of the divide between the waters of the Rio Grande and the waters of the San Juan to Wimenuche Pass.

78 thence by the most practicable route to the town of Durango.

24. Commencing at or near the junction of the south fork of the Rio Grande River and the Rio Grande River, and extending along the slopes of the said south fork to South Fork Pass on the summit of the range dividing the waters of the Rio Grande from the waters of the San Juan, and extending by the most practicable route; thence to a junction with the line of railroad extending between Antonito and Durango, and at some point west of the mouth of Piedras River, said point to be more accurately determined by detailed survey.

Fourth.

The term of existence of this company shall be fifty years from and after the filing of this certificate in the office of the Secretary of State of Colorado.

Fifth.

The government of this corporation and the management of its affairs shall be vested in a board of nine directors, and George Coppel, Adolph Engler, Robert B. Minturn and Richard T. Wilson, of the city, county and State of New York; John J. Stadiger and

John Lowber Welsh, of the city and county of Philadelphia, and State of Pennsylvania; Theodore H. A. Tromp, of The Hague, Kingdom of Holland, and William S. Jackson and David H. Moffat, of the City of Denver, and State of Colorado, shall constitute such Board of Directors for the first year of the existence of this company.

Sixth.

The capital stock of this company shall be seventy-three million five hundred thousand dollars (\$73,500,000), divided into seven hundred and thirty-five thousand (735,000) shares of the par value of one hundred dollars (\$100) each. Said stock shall be divided into preferred and common stock, as follows, to-wit:
 79 Forty-five millions five hundred thousand dollars (\$45,500,000) dollars common; twenty-eight million dollars (\$28,000,000) preferred, said preferred stock to be entitled to a non-cumulative dividend of not more than five per cent. per annum, payable out of the net earnings of the company before any dividend shall be declared and paid upon the common stock.

Seventh.

The said company is created for the purpose of carrying on its business in part beyond the limits of the State of Colorado, to-wit: In the Territories of Utah and New Mexico, and in the other States and Territories of the United States.

Eighth.

The principal business of this company shall be carried on in the counties of Arapahoe, Douglas, Jefferson, El Paso, Pueblo, Fremont, Custer, Chaffee, Park, Lake, Summit, Grand, Routt, Eagle, Pitkin, Garfield, Saguache, Gunnison, Montrose, Mesa, Delta, Bent, Huerfano, Las Animas, Costilla, Conejos, Rio Grande, La Plata, San Juan, Dolores, Hinsdale, Ouray, and San Miguel, in said State of Colorado, and the principal office of said Company shall be kept in Denver, in the said County of Arapahoe, in said State of Colorado. Other offices may be established in the City of New York and elsewhere where said Company may have interests.

Ninth.

The Stockholders of said Company, or the Directors whenever and for such length of time as the Stockholders shall so elect, shall have power to make from time to time such prudential by-laws for the government of this Company as may be necessary; and meetings of the Board of Directors of said Company may be held in the City of New York or elsewhere beyond the limits of the State of Colorado, as shall be provided by the by-laws of the Company.

In witness whereof, we have hereunto set our hands and seals this Fourteenth day of July, 1886.

(Signed)

"

"

"

"

"

"

GEORGE COPPELL.

A. MARCUS.

ROBT B. MINTURN.

T. H. A. TROMP.

JOHN J. STADIGER.

WILLIAM S. JACKSON.

DAVID H. MOFFAT.

[SEAL.]

[SEAL.]

[SEAL.]

[SEAL.]

[SEAL.]

[SEAL.]

[SEAL.]

STATE OF COLORADO,

County of Arapahoe, ss:

I, Ethan A. Reynolds, a Notary Public within and for the County and State aforesaid, do hereby certify that before me this day personally appeared George Coppell, Arnold Marcus, Robert B. Minturn, Theodore H. A. Tromp, John J. Stadiger, William S. Jackson and David H. Moffat, each to me personally known to be the same persons described in and whose names are subscribed to the foregoing articles of incorporation, and each for himself severally acknowledged that he signed and sealed the same as his free and voluntary act for the uses and purposes therein set forth.

Witness my hand and notarial seal this 14th day of July, 1886.

(Signed)

[SEAL.]

ETHAN A. REYNOLDS,

Notary Public.

EXHIBIT "B."

For and in consideration of the sum of One Dollar in hand paid, the receipt of which is hereby acknowledged, I hereby give and grant permission to The Denver and Rio Grande Railroad Company to occupy for right of way purposes a strip of land one hundred feet in width through the S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Section 28 and 81 the N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of Section 33, all in Township 32 North, of Range 10 West, N. M. P. M., in the County of San Juan, Territory of New Mexico, being fifty feet wide on each side of the center line of The Denver and Rio Grande Railroad as now located and surveyed across said land; also an additional strip of land one hundred feet in width, being fifty feet wide on each side of the foregoing right of way and extending from the southerly bank of the Animas River in said S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of said Section 28 and following the line of said survey a distance of nine hundred feet; and I further give and grant to said Company the right to purchase said land at any time within sixty days from this date for the sum of Two Hundred and Fifty no/100 Dollars, which said sum shall include all damages occasioned to me by reason of the construction, operation and maintenance of said Company's line of railroad across said land and I agree to make good and sufficient deed for said strip of land upon payment of said \$250 00/100.

It is especially understood in the foregoing agreement that the said railroad company will provide good and sufficient means for

the passage of irrigating water across the strip of land herein described.

Witness my hand and seal this 10th day of February, A. D. 1905.

(Signed)

WM. H. WHITNEY.

BELLE E. WHITNEY. [SEAL.]

TERRITORY OF NEW MEXICO,

County of San Juan, ss:

On this 10th day of February, 1905, before me personally appeared William H. Whitney and Belle E. Whitney, his wife, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

In witness whereof I have hereunto set my hand the day
82 and year in this certificate first above written.

(Signed)

GEORGE A. TINKER.

Justice of the Peace, Precinct No. 10.

FEBRUARY 14, 1905.

It is hereby agreed as a supplementary contract to the above that \$50.00 from the above price will be refunded should station be located between our land and the land of Richard Hendricks.

(Signed)

WM. H. WHITNEY.

BELLE E. WHITNEY.

EXHIBIT "B-1."

This indenture, made this Third day of March in the year of Our Lord, one thousand nine hundred and five, between William H. Whitney and Belle E. Whitney of the first part, and The Denver and Rio Grande Railroad Company, a corporation duly organized and existing under and by virtue of the laws of the State of Colorado, of the second part;

Witnesseth, That the said parties of the first part, for and in consideration of the sum of Two Hundred Dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold, remised, conveyed, released and confirmed, and by these presents do grant, bargain, sell, remise, convey, release and confirm unto the said party of the second part, its successors and assigns forever, all the following described lots or parcels of lands and real estate, situate, lying and being in the County of San Juan, Territory of New Mexico, to-wit: A strip of land 100 feet wide being 50 feet wide on each side of the center line of The Denver & Rio Grande Railroad main line survey as the same is now located over, through and across a part of the east ½
83 of the n. e. ¼ Section 33, Township 32, north, Range 10, west of the N. M. P. M. Also two additional strips each 50 feet wide adjacent to and running parallel to above described

land, one strip on the west side and one on the east side and extending from survey station 1153 to survey station 1161 and containing in all 6 54-100 acres more or less. Said center line of railroads is more particularly described as follows, to-wit: Beginning at a point in said center line in the n. e. $\frac{1}{4}$ of n. e. $\frac{1}{4}$ of said Section 33, whence the n. e. corner of said section bears S. 18 degrees, 56 minutes, E. 788 feet and running thence S. 8 degrees, 18 minutes, W. 1016 feet, thence on a 1 degree, 30 minute curve to the right 1034 feet to a point on the south boundary of said east $\frac{1}{2}$ of n. e. $\frac{1}{4}$ of said Section 33, whence the — e. $\frac{1}{4}$ corner of said section bears east about 880.

Together with all and singular, the lands, tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, claim and demand whatsoever, of the said parties of the first part, either in law or equity, of, in and to the above bargained premises, with the hereditaments and appurtenances;

To have and to hold, the said premises above bargained and described, with the appurtenances, unto the said party of the second part, its successors and assigns forever. And the said parties of the first part, for themselves, their heirs, executors and administrators, doth covenant and agree, to and with the said party of the second part, its successors and assigns, that at the time of the sealing and delivery of these presents they are well seized of the premises above conveyed, as of a good, sure, perfect and indefeasible estate of inheritance, in law, in fee simple, and have good right, full power, and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid; and that the same are free and clear

84 from all former and other grants, bargains, sales, liens, taxes, assessments and incumbrances of what kind and nature soever; and the above bargained premises in the quiet and peaceable possession of the party of the second part, its successors, heirs and assigns, against all and every person or persons lawfully claiming or to claim, the whole or any part thereof, the said parties of the first part shall and will warrant and forever defend.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

(Signed)

WILLIAM H. WHITNEY. [L. s.]

(Signed)

BELLE E. WHITNEY. [L. s.]

Interlining done before execution.

(Signed)

GEORGE A. TINKER,

J. P. and Notary Public.

TERRITORY OF NEW MEXICO,

County of San Juan, ss:

On this 15th day of March, 1905, before me personally appeared William H. Whitney and Belle E. Whitney, his wife, to me known to be the persons described in and who executed the foregoing in-

strument and acknowledged that they executed the same as their free act and deed.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.] (Signed) GEORGE A. TINKER, *Notary*.

My commission expires Feb. 23, 1909.

§5 Endorsements: Warranty Deed. Wm. H. Whitney and Wife to The D. & G. R. Co. Line South of Durango.

TERRITORY OF NEW MEXICO.

County of San Juan, ss:

I hereby certify that this instrument was filed for record on the 1st day of May, A. D., 1905, at 5:05 o'clock p. m., and duly recorded in Book 13, Page 566 of Records of Deeds and Mortgages of said County.

(Signed)

L. G. EBLEN, *Recorder*.

Fees \$1.50; compared (X).

EXHIBIT C.

The Rio Grande Railroad System.

This agreement, made the sixth day of March, A. D., 1905, between W. W. McEwan of Durango, in La Plata County, Colorado, of the first part, and The Denver & Rio Grande Railroad Company, of the second part, witnesseth:

That the first party, in consideration of one dollar (\$1.00), in hand paid, agrees that the second party, its successors and assigns, may enter on, and survey for and grade and construct a railway over and across the lands of the first party in San Juan County, New Mexico, being a part of the n. $\frac{1}{2}$ of s. e. $\frac{1}{4}$; s. w. $\frac{1}{4}$ of s. e. $\frac{1}{4}$ and s. e. $\frac{1}{4}$ of s. w. $\frac{1}{4}$ of Section 5, and the n. w. $\frac{1}{4}$ of n. e. $\frac{1}{4}$ and n. e. $\frac{1}{4}$ of n. w. $\frac{1}{4}$ of Section 8, all in T. 31, n., R. 10, w., and take and use for such purpose a strip of said land one hundred feet wide on the line, and in the direction now surveyed, over said land; and the first party agrees at any time within two months from date, and upon payment by the second party of seventy-five (\$75.00) dollars per acre for said land he will convey the same to the second party, its successors and assigns, by good and sufficient deed, conveying good, sufficient and satisfactory title, free of incumbrance, and by proper description, and such payment shall be in full for the land and all damages for entry, survey or construction of said railway.

And the second party agrees that, if it takes or uses any of said land for said purposes, it will on or before said two months from date, pay to the first party the sum of seventy-five dollars per acre therefor, on receipt of said deed, and will provide one open and one

gate crossing and all necessary water crossings, including a permanent syphon, and will fence its line in the year 1906.

Witness the hand and seal of the first party:

(Signed)

W. W. McEWEN. [SEAL.]

Witness:

F. E. SHAFER.

EXHIBIT C-1.

(Copy.)

Warranty Deed No. 3357.

This indenture, Made this first day of April in the year of our Lord, one thousand nine hundred and five, between W. W. McEwen of La Plata County, Colorado, of the first part, and The Denver & Rio Grande Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of Colorado, of the second part;

Witnesseth, That the said party of the first part, for and in consideration of the sum of seven hundred and fifty-eight and 25-100 (\$758.25) dollars, in lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold, remised, conveyed, released and confirmed, and by these presents does grant, bargain, sell, remise, convey, release and confirm unto the said party of the second part, its successors and assigns forever, all the following described lot or parcel of
87 land and real estate, situate, lying, and being in the County of La Plata, State of Colorado, to-wit:

A strip of land 100 feet wide, being 50 feet on each side of the center line of The Denver & Rio Grande Railroad as the same is now located and surveyed over, through and across the n. $\frac{1}{2}$ of s. e. $\frac{1}{4}$, the s. w. $\frac{1}{4}$ of s. e. $\frac{1}{4}$ and the s. e. $\frac{1}{4}$ of s. w. $\frac{1}{4}$ of Section 5, and the n. w. $\frac{1}{4}$ of n. e. $\frac{1}{4}$ and n. e. $\frac{1}{4}$ of n. w. $\frac{1}{4}$ of Section 8, in Township 31, north of Range 10, west of the New Mexico P. M., and containing 10 11-100 acres, more or less.

The said center line of railroad is more particularly described as follows, to-wit:

Beginning at a point on the north boundary of said n. $\frac{1}{2}$ of s. e. $\frac{1}{4}$ of said Section 5, whence the — e. $\frac{1}{4}$ corner of said section bears S. 89 degrees, 51 minutes, E. 1290 feet, and running thence on a 2 degrees, 30 minutes curve to the left 1200 feet; thence S. 20 degrees, 44 minutes W. 2547 feet; thence on a 1 degree curve to the left 633 3-10 feet; thence S. 14 degrees, 24 minutes W. 23 7-10 feet to a point on the south boundary of the n. e. $\frac{1}{4}$ of n. w. $\frac{1}{4}$ of said Section 8, whence the s. w. corner of said n. e. $\frac{1}{4}$ of s. w. $\frac{1}{4}$ bears west about 860 feet.

Together with all and singular, the lands, tenements, hereditaments and appurtenances thereunto belonging, or in anywise apper-

taining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and all the estate, right title, interest, claim and demand whatsoever, of the said party of the first part, either in law or equity, of, in and to the above bargained premises, with the hereditaments and appurtenances;

To have and to hold, the said premises above bargained and described, with the appurtenances, unto the said party of the second part, its successors and assigns forever. And the said party of the

first part, for himself, his heirs, executors and administrators,
 88 doth covenant and agree, to and with the said party of the second part, its successors and assigns, that at the time of the enfeoffing and delivery of these presents he is well seized of the premises above conveyed, as of a good, sure, perfect and indefeasible estate of inheritance, in law, in fee simple, and has good right, full power, and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid; and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments and incumbrances of what kind and nature soever; and the above bargained premises in the quiet and peaceable possession of the party of the second part, its successors and assigns, against all and every person or persons lawfully claiming or to claim, the whole or any part thereof, the said party of the first part shall and will Warrant and Forever Defend.

In witness whereof, The said party of the first part has hereunto set his hand and seal the day and year first above written.

(Signed)

W. W. McEWEN. [L. s.]

EXHIBIT D.

The Rio Grande Railroad System.

This agreement, made the eleventh day of May, A. D., 1905, between Thomas R. Bousman and Lucy N. Bousman of San Juan County, New Mexico, of the first part, and The Denver & Rio Grande Railroad Company, of the second part, witnesseth:

That the first party, in consideration of one dollar (\$1.00), in hand paid, agrees that the second party, its successors and assigns, may enter on, and survey for and grade and construct a railway over and across the lands of the first party in San Juan County, Colorado, being a part of the s. e. $\frac{1}{4}$ of Section One, T. 29 n. R. 13, w., and take and use for such purpose a strip of said land one hundred feet wide on the line L. 2, and in the direction now surveyed, over said land; and the first party agrees at any time within two months from

date, and upon payment by the second party of seven hundred dollars for all said land they will convey the same to the
 89 second party, its successors and assigns, by good and sufficient deed, conveying good, sufficient and satisfactory title, free of incumbrance, and by proper description, and such payment shall be in full for the land and all damages for entry, survey or construction of said railway.

And the second party agrees that, if it takes or uses any of said land for said purposes, it will on or before said two months from date, pay to the first party the sum of seven hundred dollars therefor, on receipt of said deed.

Witness the hand and seal of the first party.

(Signed)

THOMAS R. BOUSMAN. [SEAL.]

(Signed)

LUCY N. BOUSMAN. [SEAL.]

Endorsed: Filed in my office April 19, 1906. A. M. Bergere, Clerk.

In the District Court in and for the County of San Juan, in the First Judicial District of the Territory of New Mexico.

THE ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO,
Plaintiff,

vs.

THE DENVER & RIO GRANDE RAILROAD COMPANY, Defendant.

Reply.

Now comes the plaintiff above named and, now and at all times hereafter saving and reserving to itself all benefit and advantage of exception to the many errors, uncertainties and imperfections in the Answer of the said Defendant contained, for Reply thereto, says:

1. As to the affirmative allegations in the fifth paragraph
90 of said answer contained, plaintiff denies the same and each and every thereof.

2. As to the allegations in paragraph six of said answer contained, plaintiff admits that at certain points between the northern boundary of the County of San Juan, Territory of New Mexico, and the town of Farmington in said County, it, the said plaintiff, had run preliminary and experimental lines of survey, and had marked the same upon the ground; but plaintiff denies that it was at all times, or at any time, or is now impossible for defendant or for any person, from the said markings, or from public records or other available sources of information, to determine the alignment, grade or location of plaintiff's adopted and fixed line of railroad; but on the contrary, plaintiff avers that the final and definite line of said road, as located and adopted by plaintiff, was marked upon the ground in a such a manner as to indicate that it was the final location thereof, and so as to distinguish the same from any preliminary or experimental survey made by plaintiff, and that prior to the time of the acts of said defendant, complained of in the complaint herein, maps showing the definite location of said line had been filed, in the United States Land Office at Santa Fe, New Mexico, and, in the office of the Commissioner of the General Land Office at Washington, D. C., showing the definite location of such line of plaintiff, which said maps were matters of public record, and that the said definite location of plaintiff's said line of road, and the maps thereof

so filed in said local and general land offices as aforesaid, had theretofore been approved by the Commissioner of the said General Land Office; and plaintiff further avers that the said defendant had actual knowledge of the alignment, grade and location of the said plaintiff's said definitely located line of road.

3. As to the affirmative allegations contained in the seventh paragraph of said answer, plaintiff denies the same and each
91 and every thereof, and as to that portion thereof which alleges that the elimination of the alleged crossings of plaintiff's said line would result to plaintiff in a straighter alignment or easier grades or increased capacity or efficiency of any line that might be built thereon, or a diminution of the dangers and hazards of operation thereof, plaintiff states that the same constitutes no defense to the said cause of action set forth in the complaint herein, and that the same is immaterial, and plaintiff therefore demurs to the same and asks and prays that the said portion of said paragraph may be stricken from said answer, and that proof touching the same may be excluded upon the trial of this cause.

4. As to the affirmative allegations contained in paragraph nine of said answer, plaintiff denies the same and each and every thereof.

5. As to the affirmative allegations contained in paragraph fourteen of said answer, plaintiff denies the same and each and every thereof, and particularly plaintiff denies that it, said plaintiff, has not acquired the said right-of-way in said paragraph mentioned.

6. As to the affirmative allegations contained in paragraph fifteen of said answer, plaintiff denies that the said defendant had full right, or any right whatsoever, or any authority whatsoever, to cross the line of road or route surveyed and adopted by plaintiff, as set forth in and by its complaint herein.

7. As to the allegations contained in paragraph seventeen of said answer, plaintiff denies that defendant was unable to acquire any information with reference to the grades and profiles of plaintiff's said line, and denies that at the time of the filing of the complaint herein, defendant had constructed or was engaged in the actual construction of its said line of road, otherwise than in an illegal way and as stated in the complaint herein.

92 8. As to the allegations contained in paragraph twenty-three of said answer, plaintiff denies the same and each and every thereof, except as to those parts thereof, which are admissions of the allegations contained in plaintiff's complaint herein; and specifically plaintiff further denies that the said defendant, at the time of the filing of said complaint, had definitely or otherwise fixed, located or established any line of railroad, or done anything towards the establishment thereof, except as alleged in the complaint herein.

9. As to the allegations contained in paragraph twenty-six of said answer, plaintiff denies that the said defendant, as alleged in the said paragraph, has fully or at all complied with the laws of the Territory of New Mexico, with reference to the construction or operation of railroads, and denies that defendant has, or ever had, full or lawful authority, or any authority whatsoever, to proceed to lay out, construct, maintain, or operate its said proposed line of railroad,

or any line of railroad whatsoever, within the Territory of New Mexico; and plaintiff denies that all or every or any of the acts and doings of defendant in the premises were or are with full legal or any authority therefor, and denies that defendant has or had full or any right or lawful or any authority to construct, maintain or operate its said proposed line of railroad, or any railroad whatsoever in the said Territory of New Mexico; and plaintiff further denies that at the time of the institution of this action the said defendant had acquired, or had the right to acquire, by purchase or otherwise, except as in the plaintiff's complaint mentioned, much or any of the right-of-way required by it, said defendant, for the construction of its said proposed line of railroad, and plaintiff further denies that any land or right-of-way could legally have been or be required or acquired by said defendant for the construction, maintenance or operation of a line of railroad, or any extension or branch of

93 a line of railroad, in the said Territory of New Mexico; and plaintiff further denies that the said defendant has at all times or at any time proceeded strictly or at all within its legal rights or in accordance with law, as alleged in the said paragraph, or that the said defendant had any legal rights in the premises; and plaintiff alleges that it, said plaintiff, did have rights to land for its right-of-way as alleged in the complaint herein and avers that the said defendant was without lawful right or power to acquire the same, by condemnation proceedings or otherwise.

10. As to the several allegations contained in paragraph "A" of said answer, plaintiff denies the same and each and every thereof.

11. As to the several allegations contained in paragraph "B" of said answer, plaintiff denies that said defendant had fully or at all complied with the laws of the Territory of New Mexico with reference to the location or construction or operation of railroads, and denies that said defendant is or was duly or at all authorized or fully or legally or at all empowered to proceed with the construction, operation or maintenance of a railroad in the said Territory of New Mexico; and plaintiff says that at some time after the location and adoption of plaintiff's said line of railroad and right-of-way, as in the complaint herein alleged, the said defendant attempted to enter upon the survey and construction of a line of railroad, from the town of Durango, in the State of Colorado, down the valley of Las Animas River, within the said State of Colorado, and that thereafter, and after this plaintiff had acquired its absolute and fixed vested rights in and to its located line of railroad and right-of-way as in and by said complaint described, and after the institution of this action, the said defendant did further attempt to acquire, by purchase and otherwise, some part of a right-of-way in the said Territory of New Mexico, and that said defendant did thereupon

94 further attempt to proceed to the construction of a line of railroad in the said Territory of New Mexico, and did thereupon further attempt to institute certain condemnation proceedings under the eminent domain law of the said Territory of New Mexico, for the purpose of acquiring certain other lands for the use of its said alleged railroad and, at the time of the institution of this suit,

was about to attempt to institute further condemnation proceedings, as in the complaint herein alleged; but plaintiff says and avers that such location and construction of such line of railroad by defendant was by said defendant begun long after the location and adoption of the line of road and route and right-of-way located and adopted by plaintiff, as in the said complaint set forth, and with full notice and means of knowledge on the part of the said defendant of the said prior location and adoption of the said line and prior appropriation of said right-of-way by plaintiff, and of the rights acquired and held by plaintiff therein and thereto, as in said complaint alleged; and plaintiff further denies that, in or about the month of November, 1904, or at any other time, the said defendant, in accordance with any power or privilege vested in it, or in accordance with any provision of its articles of incorporation, entered upon the location or construction of any line of railroad from the southern boundary of the State of Colorado, to the town of Farmington in the County of San Juan in the Territory of New Mexico, or to the junction of Las Animas and San Juan Rivers, or that in prosecution of or for the purpose of carrying out any such enterprise or the construction of such line, the defendant, in any lawful manner, or otherwise, acquired, or could lawfully acquire by purchase or otherwise, any part of the right-of-way which might have been desired for such road; and plaintiff admits that for some portions of the right-of-way which might have been so desired said defendant was unable to agree

95 with the owners of said lands as to the compensation to be paid therefor, but plaintiff denies that said defendant was compelled to institute condemnation proceedings under the eminent domain laws of the said Territory of New Mexico, but admits that said defendant did undertake to institute such proceedings in said Territory, for the alleged purpose of acquiring such lands and right-of-way; and plaintiff states further that it is informed and believes, and therefore charges the fact to be, that at the time of the institution of this suit, the said defendant had made preparations and was about to attempt to institute other condemnation proceedings for said alleged purpose; but plaintiff has no knowledge or information sufficient to form a belief, as to whom it, said defendant, intended to attempt to make parties to such proceedings, but denies that it was the purpose of defendant in any manner whatsoever to make this plaintiff a party to such proceedings, although this plaintiff had acquired a lawful right, under the laws of the Territory of New Mexico and of the United States of America, to its said right-of-way, which it had located, adopted, and appropriated as stated in its said complaint herein, and to those portions thereof which the said defendant was proposing to cross and trespass upon, as stated in said complaint.

12. As to the allegations contained in paragraph "C" of said answer, plaintiff denies that at the time or prior to the institution of this suit the said defendant had fully or at all completed the location of its said line of railroad, as described in its alleged articles of incorporation, between the north boundary of the Territory of New Mexico, and the said town of Farmington, in the Territory of New

Mexico, and denies that it had with any force of men whatever entered upon the construction of its said alleged line, or had constructed any number of miles or any portion thereof in the Territory of New Mexico, when it was restrained by the injunction in this cause.

13. As to the allegations contained in paragraph "D" of said answer, plaintiff says that it has no knowledge or information sufficient to form a belief as to whether or not the said defendant on or about the tenth day of February, 1905, or at all, obtained from the said W. H. Whitney and wife the agreement or option for the purchase of a right-of-way, attached to said answer and marked Exhibit "B", or as to whether thereafter the said Whitney and wife conveyed to the said defendant said right-of-way or executed the deed copy of which is attached to said answer marked Exhibit "B-1", and plaintiff therefore denies said allegations and each and every thereof, and plaintiff further says that if said deed of conveyance or contract were ever obtained by said defendant from the said Whitney and wife, the said defendant obtained the same with full knowledge and means of knowledge that the said plaintiff had already theretofore acquired the right to appropriate the said lands embraced in the description mentioned in said contract and deed for its line of railroad, and that said defendant had no lawful right or any right whatever to enter into such agreement or obtain such deed of conveyance; and plaintiff further denies that said defendant was fully or otherwise or at all authorized or legally or at all entitled by virtue of such pretended purchase or ownership, or otherwise, to construct or operate its railroad over, upon or along said land, and denies that the said defendant is the sole or lawful owner thereof, or that it had in law any right to acquire the same; and further plaintiff denies that the said defendant was an innocent purchaser of said lands, premises or alleged right-of-way, in said paragraph mentioned, or that said defendant was without notice, or that defendant was, by virtue of any alleged purchase or ownership as stated in said paragraph of said answer, authorized or legally entitled to construct or operate its railroad over, upon or along the said alleged right-of-way so pretended to have been purchased as

97 in said paragraph mentioned, without let or hindrance from the said plaintiff or otherwise.

14. As to the allegations in paragraph "E" of said answer contained, plaintiff says it has no knowledge or information sufficient to form a belief as to whether or not the said option for purchase or the said deed in said paragraph mentioned, copies of which are attached to said answer as Exhibits "C" and "C-1," were by the said McEwen executed, at the dates in said paragraph mentioned, or at all, and therefore denies the said allegations and each and every thereof; but plaintiff says that if said deed or contract were ever obtained from the said McEwen by said defendant, the said defendant obtained the same with full knowledge and means of knowledge that the said plaintiff had already theretofore acquired the right to appropriate the said lands embraced in the description mentioned in the said contract and deed for its line of railroad, and that

said defendant had no lawful right or any right whatever to enter into such agreement or obtain such deed of conveyance; and plaintiff further denies that said defendant was fully or otherwise or at all authorized or legally or at all entitled by virtue of such pretended purchase or ownership, or otherwise, to construct or operate its railroad over, upon or along said land, and denies that the said defendant is the sole or lawful owner thereof, and that the said defendant had in law any right to acquire the same; and further plaintiff denies that the said defendant was an innocent purchaser of said lands, premises or alleged right-of-way, in said paragraph mentioned, or that said defendant was without notice, or that defendant was by virtue of any alleged purchase or ownership as stated in said paragraph of said answer, authorized or legally entitled to construct or operate its railroad over, upon or along the said alleged right-of-way so pretended to have been purchased as in said paragraph mentioned,

without let or hindrance from the said plaintiff or otherwise; but as to the said W. H. Whitney and wife, and the said W. W. McEwen, mentioned in the said paragraphs "D" and "E" of said answer, plaintiff avers that long prior to the time said alleged options and deeds or either of them were taken or obtained by the said defendant, if the same were by it secured as in said answer alleged, the said Whitney and wife, and the said McEwen had each of them agreed with this plaintiff upon the compensation to be to them paid for the lands taken and appropriated by this plaintiff for its said right-of-way, over and across said premises in the complaint herein mentioned, and had authorized plaintiff to enter into possession of said premises for the purpose of the construction of its said line of road, over and across the land in said paragraphs "D" and "E" mentioned, and along and upon the said plaintiff's said line as in the complaint set out, all of which facts were well known to the defendant at the time it may have obtained the said deeds and contracts.

15. As to the allegations contained in paragraph "F" of said answer, plaintiff alleges the facts to be that on the 23rd day of February, 1905, the said Edith B. M. Young, being then the owner of the said west half of the southeast quarter and the southeast quarter of the southwest quarter of Section Eighteen, in Township Thirty, north of Range Eleven, west, made and executed, and on the eleventh day of April, 1905, acknowledged and delivered to this plaintiff her certain agreement and option in writing, wherein and whereby she undertook and agreed to sell to this plaintiff the lands embraced in its said right-of-way, as so located over and across said tract of land, as in the complaint herein mentioned, and wherein and whereby she authorized said plaintiff to enter into the possession of said land for the purposes of the location and construction of its said line of railroad, and that thereafter, and, to-wit, on the ninth day of May,

1905, in pursuance of and according to the terms of said option and agreement, this plaintiff purchased from said Edith B. M. Young, for the consideration and sum of four hundred dollars, the said land embraced in said located line and right-of-way of plaintiff, and that thereupon the said Edith B. M.

Young, on said day, made, executed, acknowledged and delivered to plaintiff her certain warranty deed and instrument of conveyance, wherein and whereby she conveyed the said land and premises and right-of-way to plaintiff, for the valuable consideration above expressed, which said deed was thereafter, on to-wit, the twelfth day of May, 1905, duly filed for record and recorded in the office of the probate clerk and ex-officio recorder of the County of San Juan in the Territory of New Mexico; that said option of purchase, and the said purchase and deed of conveyance, were made and taken in good faith for the purpose of acquiring the said lands for the purpose of construction, maintenance and operation of plaintiff's said line of railroad, and without notice or knowledge at any time prior to such purchase that the said defendant had instituted any action or proceeding to acquire title thereto; that at the time said deed was executed and delivered, no notice of the alleged condemnation proceedings to acquire title thereto in said answer mentioned had been served upon the said Young, and that neither the said Young nor this plaintiff had any notice or knowledge that such alleged proceeding had been instituted, and that no lawful process, either personal or by publication, had been sued out in said condemnation case, as against the said Young, at said time; and plaintiff further avers that at the time of the institution of said condemnation proceedings by said defendant, the said defendant had been advised and well knew that said option and agreement of purchase had been executed by said Young, and that this plaintiff had located and appropriated the said lands so afterward conveyed to it by said Young,

for the purposes of the construction of its said line of railroad; and plaintiff denies that at said time the defendant was not advised of plaintiff's right, title and interest and claim therein and thereto, and denies that said deed was so executed or taken or purchase made after the institution of this suit, or that said deed was dated back, or that the same does not disclose the real date on which it was executed, and denies that the said deed was taken or obtained in any manner or for any purpose otherwise than as hereinbefore stated and in good faith, and for the purpose of the construction, maintenance and operation of plaintiff's said line of road, and plaintiff denies each and every other allegation in said paragraph contained, not hereinbefore admitted.

16. As to the allegations in said paragraph "G" contained, in said answer, plaintiff says that it has no knowledge or information sufficient to form a belief as to whether or not the said option for purchase or the said deed in said paragraph mentioned, copy of which said option is attached to said answer as Exhibit "D," were by the said Bousman executed, at the dates in said paragraph mentioned, or at all, and therefore denies the said allegations and each and every thereof; but plaintiff says that if said deed or contract were ever obtained from the said Bousman by said defendant, the said defendant obtained the same with full knowledge and means of knowledge that the said plaintiff had already theretofore acquired the right to appropriate the said lands embraced in the description mentioned in the said contract and deed for its line of railroad, and

that said defendant had no lawful right or any right whatever to enter into such agreement or obtain such deed of conveyance; and plaintiff further denies that said defendant was fully or otherwise or at all authorized or legally or at all entitled by virtue of such pretended purchase or ownership, or otherwise, to construct or operate its railroad over, upon or along said land, and that the said defendant is the sole or lawful owner thereof, and denies that the said defendant had in law any right to acquire the same; and

101 further plaintiff denies that the said defendant was an innocent purchaser of said lands, premises or alleged right-of-way, in said paragraph mentioned, or that said defendant was without notice, or that defendant was by virtue of any alleged purchase or ownership as stated in said paragraph of said answer, authorized or legally entitled to construct or operate its railroad over, upon or along the said alleged right-of-way so pretended to have been purchased as in said paragraph mentioned, without let or hindrance from the said plaintiff or otherwise; but as to the said Bouseman plaintiff avers that long prior to the time said alleged option and deed were taken or obtained by the said defendant, if the same were by it secured as in said answer, alleged, the said Bouseman had agreed with this plaintiff upon the compensation to be to him paid for the lands taken and appropriated by this plaintiff for its said right-of-way over and across said premises in the complaint herein mentioned, and had authorized the plaintiff to enter into possession of said premises for the purpose of the construction of its said line of road, over and across the land in said paragraph "G" mentioned, and along and upon the said plaintiff's said line as in the complaint set out, all of which facts were well known to the defendant at the time it may have obtained the said deed and contract.

17. As to the allegations in paragraph "H" of said answer contained, plaintiff admits that at the time of the institution of this suit it had no record title to the parcels in said paragraph mentioned, by deed of conveyance, but denies that it had no right, title or interest therein which the defendant was under any legal obligation to respect, and on information and belief states the fact to be that the said defendant possessed full knowledge and information as to the rights of the said plaintiff in and to the properties referred to in said paragraph "H," and that plaintiff had acquired the right

102 to construct, maintain and operate its road over the same, and to obtain the title to said lands for said purpose, and also had full knowledge and means of knowledge that plaintiff had agreed with the owners of said several tracts of land for the purpose of acquiring the same for its line of road, and plaintiff alleges that notwithstanding said restraining order of this Court said defendant had no legal right or authority to proceed to secure by purchase, condemnation or otherwise, any title to said lands or right-of-way which it might have required for the construction of its alleged line of railroad, as pretended to be described in its alleged articles of incorporation, or along its proposed line alleged to have been surveyed and located by it.

18. As to the allegations in paragraph "I" of said answer contained, plaintiff denies the same and each and every thereof.

19. As to the allegations in said paragraph "J" of said answer contained, plaintiff denies that at the time of the commencement of this suit the said defendant was in the possession of the lands or premises in controversy or any part thereof, or that it had any right thereto, and states the fact to be that even if it is now in possession of said lands it is wrongfully in the possession thereof and has no right to be in possession thereof, and that such possession, if any, defendant has so taken since the commencement of this suit; and further plaintiff states the fact to be that even if the said defendant has attempted to acquire by purchase or condemnation any title of any kind to the said land or premises, it did so contrary to law and without proper authority, the said premises having theretofore been duly taken and appropriated by this plaintiff for its line of road as in the complaint herein set out, and the said defendant not having complied with the laws of the Territory of New Mexico so as to authorize or empower it to take or acquire lands for the construction or operation of said line of road or for any purpose; and plaintiff further avers that any such pretended title by said defendant attempted to be acquired is of no validity or binding force as against this plaintiff, or otherwise. Plaintiff denies that defendant had constructed, completed or occupied its road at the time of the commencement of this suit, but admits that since the commencement of this suit, on or about the 22nd day of September, 1905, defendant did have a road practically completed and in operation for the use of the public, down the valley of Las Animas river, between the northern boundary of the Territory of New Mexico and of the County of San Juan, and the town of Farmington, and upon and over the lands and premises in controversy herein; but as to whether or not the said defendant has thereby been able to, or has as a common carrier of freight or passengers, conferred any benefit or advantage whatever upon the public or upon the inhabitants of said San Juan County, this plaintiff is not advised and has not sufficient knowledge or information on which to base a belief, and therefore demands strict proof of said allegation, if deemed material. Plaintiff denies that it has not acquired or sought to acquire or attempted to acquire a right-of-way for its line of road, designated in the complaint herein, but states the fact to be that it has acquired the right-of-way for a large part of its route and has attempted to acquire the right-of-way for all of it and has proceeded so far in such attempted acquisition thereof as it was proper for it to do, in view of the proceedings which the defendant was allowed to institute and carry on, on the dissolution of the injunction in this case, and plaintiff avers that the said agreements by it held for right-of-way and in its complaint mentioned, are still in force and effect and said plaintiff is by means of the present suit asserting its rights to the said property, in order to enable it to proceed with the acquisition of said title and the construction of its said road thereon.

Plaintiff admits that it has not fully constructed its line of road in said county of San Juan or elsewhere in the Territory of New Mexico, but denies that it has not attempted to do so, and alleges the fact to be that it has been prosecuting the

work and moving forward towards the construction, operation and maintenance of its said road in said Territory of New Mexico, as fully as it was authorized or justified in doing in view of the litigation in this case and other litigation instituted by said defendant, for the purpose of attempting to acquire the right-of-way to which the plaintiff was and is entitled for the construction, maintenance and operation of its said road in this Territory and in said County of San Juan, and that it has at all times since its organization, in good faith, continuously and persistently, with all due and possible diligence proceeded with its work and operations towards the construction of said road, as alleged in said complaint, and plaintiff denies that it does not intend to construct a line of railroad along and upon the line and route described in its said complaint, but states the fact to be that it is its purpose and intent to construct said line of railroad, along said line and route.

Plaintiff denies that it has not suffered any damage by reason of the construction or operation by defendant of its said road, in said County of San Juan, and it further denies that it has been guilty of any laches or any failure or refusal to acquire or to attempt to acquire any right-of-way for its line or route in said County of San Juan or in said Territory of New Mexico, or that by reason of its failure to complete or construct its railroad in said County or by reason of anything whatsoever it is estopped from denying any alleged rights of the defendant, or to claim to recover damages which it, plaintiff, has suffered, of and from defendant, by reason of the construction of its railroad along, upon and across the lands and premises in controversy in said cause.

And plaintiff alleges and states the fact to be that since the institution of this suit and the dissolution of the temporary restraining order herein, the said defendant has wrongfully, unlawfully and without right, continued its wrongful acts and trespasses in the complaint complained of, and as it threatened, as charged in said complaint, has repeatedly and at will entered in and upon plaintiff's said premises and property and its said right-of-way, so located, adopted and appropriated by it as in said complaint set out, and has unlawfully and unnecessarily and repeatedly trespassed thereon and taken and occupied for the purpose of the construction of its own road large parts of plaintiff's said line and right-of-way, including the parts in paragraph nine of the complaint herein specifically mentioned, and, as in said complaint it was alleged and charged it intended and threatened to do, said defendant has also at other places along plaintiff's said premises continued such trespasses; and on to-wit, the northeast quarter of section fifteen, township twenty-nine north of range thirteen west, in said County of San Juan, the said defendant has wrongfully, unlawfully and without right, laid out, surveyed, staked and marked along the ground and has attempted to locate and construct its line of road along, over and across the said line, right-of-way and premises of plaintiff, longitudinally for a distance of about nine hundred feet and on to-wit, the northwest quarter of section fifteen, township 29 north of range 13 west, in said county, said defendant has wrong-

fully, unlawfully and without right, laid out, surveyed, staked and marked along the ground and has attempted to locate and construct its line of road along, over and across the said line, right-of-way and premises of plaintiff, longitudinally for a distance of about six hundred feet; and on, to-wit, the northeast quarter of section 11 and the northwest quarter of section 12, township 29 north, range 13 west in said county, the said defendant has wrongfully, unlawfully and without right, laid out, surveyed, staked and marked along the ground and has attempted to locate and construct its line of road along, over and across the said line, right-of-way and premises of plaintiff, longitudinally for a distance of about fifteen hundred feet; and on, to-wit, the southwest quarter of section one and the northwest quarter of section twelve, township twenty-nine north, range 13, west, in said County, said defendant has wrongfully, unlawfully and without right, laid out, surveyed, staked and marked along the ground and has attempted to locate and construct its line of road along, over and across the said line, right-of-way and premises of plaintiff, longitudinally for a distance of about one thousand feet; that by such actions and trespasses and its wrongful entry upon and occupation of large parts of plaintiff's said line, defendant has hampered and delayed plaintiff in the construction of its said road and rendered it impossible for plaintiff to construct its said road over and along its said line, during the pendency of this suit, and until plaintiff's rights in the premises are established, and that any delay which there may have been on the part of plaintiff in the further acquisition of said right-of-way and the construction of said line of road has been and is occasioned by the said wrongful acts and trespasses of defendant, which this action was intended to prevent.

20. And further replying to the said answer, plaintiff denies generally and specifically each and every allegation therein contained, not herein specifically admitted.

Wherefore, plaintiff prays as in and by its complaint herein.

RITTER & BUCHANAN,
CATRON & GORTNER,
A. B. RENEHAN,

Attorneys for Plaintiff.

TERRITORY OF NEW MEXICO,
County of Santa Fe, ss:

107 C. C. Sroufe, being first duly sworn, upon oath deposes and says that he is the principal assistant engineer of the Arizona & Colorado Railroad Company of New Mexico, plaintiff in the above entitled cause, and is the agent of such plaintiff for the purposes of making and verifying the foregoing Reply; that he has read over the same and knows the contents thereof, and that the said Reply is true of affiant's own knowledge, except as to the matters and things therein stated on information and belief, and as to such matters affiant states that he believes the same to be true.

C. C. SROUFE.

Subscribed and sworn to before me this May 3rd, 1906. My commission expires Oct. 25th, 1907.

[SEAL.]

LOUISA PRATT,
Notary Public.

Endorsed: Filed in my office May 5, 1906. A. M. Bergere, Clerk.

District Court, County of San Juan.

ARIZONA & COLORADO RD. Co.

vs.

DENVER & RIO GRANDE RD. Co.

To Messrs. Abbott & Abbott, Attorneys for Defendant, Santa Fe, N. M.:

Please take notice that we will call up the above entitled cause for the purpose of moving the appointment of a referee or examiner to take proofs therein before His Honor, John R. McFie, Associate Justice, at chambers in the City of Santa Fe, at 10 o'clock a. m., Monday, May 14th, 1906, or as soon thereafter as the court may hear us.

May 8th, 1906.

A. B. RENEHAN,
CATRON & GORTNER,
Attorneys for Plaintiff.

108 Endorsed: Filed in my office May 10, 1906. A. M. Bergere, Clerk.

District Court, First Judicial District, Territory of New Mexico, in and for the County of San Juan.

THE ARIZONA & COLORADO RD. Co. OF NEW MEXICO, Plaintiff,

vs.

THE DENVER & RIO GRANDE RD. Co., Defendant.

Motion for Change of Venue.

Comes plaintiff and moves the court to change the venue herein to some court as provided by law outside of the First Judicial District of the Territory of New Mexico, for the reasons set forth in the accompanying affidavits.

May 15th, 1906.

RITTER & BUCHANAN,
CATRON & GORTNER,
A. B. RENEHAN,
Attorneys for Plaintiff, Santa Fe, N. M.

Affidavits.

TERRITORY OF NEW MEXICO,

County of Santa Fe:

Thos. B. Catron, A. B. Renehan and Rob't C. Gortner, first being duly sworn, upon oath depose and say each for himself and not one for the other, that he is acquainted with the parties in and to the above entitled case and the issues involved therein, and that
 109 he is also acquainted with the other and various litigation heretofore and now pending in the said District Court of the County of San Juan between said parties, and touching upon the issues between them herein; that he is acquainted with the rulings and decisions of the presiding judge of said court in reference to the said litigation, and with the personal feeling and attitude of said presiding judge touching said matters and in regard thereto; that the said presiding judge of said court is prejudiced, biased and pre-occupied in favor of the defendant in said cause, and against the plaintiff, and believes and feels that the plaintiff is not and has not been in said cause intending to prosecute the same in good faith or the construction of its line of railroad therein mentioned, but that plaintiff is prosecuting same for some motive other than set up in said complaint; that said presiding judge believes and feels that said defendant acted rightfully and in good faith throughout, in connection with the matters at issue in this cause, that the presiding judge is interested in the success of said defendant because of his feeling in favor of the points of law and fact advanced by and on behalf of said defendant herein; that plaintiff cannot have justice done it at the trial in said county and court where the said cause is now pending, or before the said presiding judge.

T. B. CATRON.
 R. C. GORTNER.
 A. B. RENEHAN

Subscribed and sworn to before me this May 15th, 1906.

[SEAL.]

LOUISE PRATT,

Notary Public.

To Messrs. Abbott & Abbott, Attorneys for Defendant in above entitled cause, Santa Fe, New Mexico.

GENTLEMEN: Please note the foregoing motion and affidavits; and that same will be called up for hearing before
 110 his Honor John R. McFie, Associate Justice, etc., at the court house in Taos, County of Taos, Territory of New Mexico, at 10 o'clock a. m., May 21st, 1906, or as soon thereafter as we may be heard by the said Judge, sitting in said cause in and for the County of San Juan, in said First Judicial District and Territory of New Mexico.

RITTER & BUCHANAN,
 CATRON & GORTNER.
 Per R. C. GORTNER,
 A. B. RENEHAN,

Attorneys for Plaintiff.

May 15, 1906.

Endorsed: Filed in my office May 15, 1906. A. M. Bergere,
Clerk.

District Court, San Juan County.

No. 391.

THE ARIZONA & COLORADO R. R. OF NEW MEXICO, a Corporation,

vs.

THE D. & R. G. R. R. Co., a Corporation.

Civil.

Ritter & Buchanan of Durango, Colo., and A. B. Renchan, of
Santa Fe. \$10.00 paid by plaintiff May 12, 1905.

Date.	Proceedings.	Fees.
1905,		
May 12	Complaint filed, .15, docket, \$2.00.....	\$2.15
" 13	One order to show cause and four copies issued, (2 C. C. p. B. 2.80) pd., R. B. 197 & 7	1.05
" 13	Injunction bond filed and approved.....	.15
" 12	Affidavits and maps filed.....	.15
" 13	1 writ of injunction and 1 copy issued.....	1.50
" 12	Summons and 1 copy issued.....	1.50
June 2	Demurrer filed15
111		
" 3	Demurrer sustained, cause dismissed at p'tiff's costs, R. B. P. 207.....	1.50
" 3	Motion for appeal filed.....	.15
" 3	Order granting appeal and fixing bond filed and entered, R. B. P. 207.....	.45
" 3	Writ of injunction ret., served, filed.....	.15
" 5	Appeal bond filed and approved.....	.15
1906,		
Mar. 6	Mandate from the Supreme Court filed.....	.15
" 27	Order filed and entered, R. B. P. 303.....	.60
Apr. 7	Order filed and entered, R. B. P. 304.....	.40
" 20	Answer filed15
May 5	Reply filed15
" 10	Notice filed15
" 15	Motion for change of venue filed.....	.15
" 23	Order entered changing venue to Bernalillo Co.60
June 1	Transcript of Record and Certificate (B. 50) .	2.40
		<hr/>
		13.10 .70

In the District Court of the First District of the Territory of New Mexico in and for the County of San Juan.

And thereafter and on to-wit the 13th day of May, 1905, there was entered of record a certain order, which order is in words and figures, to-wit:

No. 391.

THE ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO,
a Corporation, Plaintiff,

vs.

THE DENVER & RIO GRANDE RAILROAD COMPANY, a Corporation,
Defendant.

This cause having come on to be heard on this 13th day of May, 1905, upon the verified complaint of the plaintiff, and affidavits and plats filed in support thereof, wherein the plaintiff prays for a writ of injunction against the defendant, in manner and form as
112 hereinafter set forth, and the court being fully advised in the premises, grants to the plaintiff the writ of injunction, as follows:

1. That said defendant, The Denver & Rio Grande Railroad Company, its officers, agents, servants, contractors, representatives and employes, and each and every person acting by or under the authority, direction or control of the said company defendant, be and they are hereby, until the further orders of the court in the premises, restrained and enjoined from trespassing upon, interfering with or in anywise molesting and from building or constructing over, across, along or upon, the location, line, route, right-of-way and premises located and appropriated by the plaintiff, The Arizona & Colorado Railroad Company of New Mexico, in said County of San Juan and Territory of New Mexico, and particularly as the same is laid out, staked and marked on the ground, through governmental subdivisions following, that is to say, the northeast quarter of section thirty-three, township thirty-two, north of range ten west, N. M. P. M.; the southeast quarter of section five, township thirty-one, north of range ten west, N. M. P. M.; the west half of the southeast quarter, and the southeast quarter of the southwest quarter of section eighteen, township thirty, north of range eleven west, N. M. P. M.; the northwest quarter of section thirty-two, township thirty north, range twelve west, N. M. P. M., the northwest quarter of section six, township twenty-nine north, range twelve west, N. M. P. M.; the southeast quarter of section one, township twenty-nine north of range thirteen west, N. M. P. M.; the southwest quarter of the northeast quarter and the west half of the southeast quarter of section eleven, township twenty-nine north of range thirteen west, N. M. P. M.; the west half of the northwest quarter of section fifteen, township twenty-nine north of range thirteen west, N. M. P. M., and

113 from building or constructing over, across, along or upon said location, route and right-of-way any grade, cutfill, embankment, road or railroad, or placing any materials, ties, rails machinery or other materials thereon, and from removing any earth or materials therefrom, and also from instituting, prosecuting or proceeding with any condemnation suit or proceedings, insofar only as the same affects the location, line, route or right of way of the plaintiff, as aforesaid.

2. It is further ordered that a copy hereof, with a copy of the complaint for greater particularity, be served upon the defendant, with the writ of injunction, at least ten days before the return day hereinafter fixed.

3. It is further ordered that the defendant company show cause, if any it have, at the chambers of the judge at Santa Fe, New Mexico, at the hour of ten o'clock in the morning of the 2nd day of June, 1905, why the said injunction should not be made perpetual or continued.

4. It is further ordered that the defendant or someone for it enter into a good and sufficient bond in the penalty of five thousand dollars, in favor of the defendant, conditioned in usual form for the payment of any damage or loss that may come to the defendant by reason of the said injunction, in case the same is dissolved as unlawful, improvident or improper.

5. It is further ordered that a temporary writ of injunction issue out of the office of the clerk of the said court, and under the seal thereof, upon the filing of the bond aforesaid, which is to be approved by the court, restraining and enjoining the defendant, as hereinbefore set forth, until the further order of the court.

JOHN R. McFIE,

Judge, etc.

114 Which said Order is endorsed in words and figures as follows, to-wit:

No. 391. San Juan County. The Arizona & Colorado R. R. Co. of New Mexico, a corporation, vs. The D. & R. G. R. R. Co., a corporation. Order. Ritter & Buchanan, of Durango, Colo., and A. B. Renchan of New Mexico. Filed in my office, May 13, 1905, A. M. Bergere, Clerk. R. B. P. 196 and 197.

And thereafter and on to-wit, the 3rd day of June, 1905, there was entered of record a certain order, which order is in words and figures to-wit:

In the District Court.

TERRITORY OF NEW MEXICO,
County of San Juan, ss:

No. 391.

THE ARIZONA & COLORADO R. R. CO. OF NEW MEXICO, a Corporation,
Plaintiff,
vs.
THE DENVER & RIO GRANDE R. R. CO., a Corporation, Defendant.

And now on this 2nd day of June, 1905, this cause coming on to be heard before the Hon. John R. McFie, Judge of the First Judicial District of New Mexico, at his chambers in Santa Fe, New Mexico, pursuant to the order of Court heretofore entered herein upon the demurrer heretofore filed herein, and both parties being represented by counsel, and the matter having been fully argued by both counsel for plaintiff and counsel for defendant, and the Court being fully advised in the premises doth hold that the defendant's demurrer to the plaintiff's bill herein be sustained and it is accordingly ordered, adjudged and decreed that defendant's demurrer to plaintiff's bill be sustained and that plaintiff's bill be dismissed of record at plaintiff's cost.

115 To which find and to the entry of which order and decree, the plaintiff, by its counsel, duly objected and excepted and thereupon prayed an appeal to the Supreme Court of the Territory of New Mexico and time until 60 days from the date of the entry of the foregoing decree was and is allowed to the plaintiff within which to file its appeal bond and to perfect its appeal herein.

JOHN R. MCFIE,
Judge, etc.

Which said Order is endorsed in words and figures as follows to-wit:

No. 391. Original. County of San Juan. The Arizona & Colorado R. R. Co. vs. The D. & R. G. R. R. Co. Decree. Filed in my office, June 3, 1905. A. M. Bergere, Clerk. R. B. P. 207.

And hereafter and on to-wit the 3rd day of June, 1905, there was entered of record a certain order, which is in words and figures to-wit:

No. 391.

THE ARIZONA & COLORADO R. R. CO. OF NEW MEXICO
vs.
THE DENVER & RIO GRANDE RAILROAD COMPANY.

This cause having come on to be heard this 3rd day of June, 1905, upon the motion of the plaintiff for an appeal therein, to the Supreme

Court of the Territory of New Mexico, with supersedeas and to fix the amount of a supersedeas bond in the premises, and the Court having heard argument of the respective parties in open court, and being sufficiently advised in the premises grants said motion, as follows:

It is hereby ordered that there be, and there is hereby granted to the plaintiff an appeal to the Supreme Court of the Territory of New Mexico, from the final decree this day in said cause rendered, with supersedeas of the said final decree, supersedeas bond being fixed in the sum of five hundred (\$500) dollars, but it is provided that the supersedeas so hereby granted shall not apply to or have the effect of reinstating the injunction by said final decree dissolved.

JOHN R. MCFIE,
Judge, etc.

Which said order is endorsed in words and figures as follows, to-wit:

No. 391. Original. County of San Juan. The Arizona & Colorado R. R. Co. vs. The Denver & Rio Grande Co. Order. Filed in my office June 3, 1905. A. M. Bergere, Clerk. R. B. P. 207.

And thereafter and on to-wit the 27th day of March, 1906, there was entered of record a certain order, which order is in words and figures, to-wit:

No. 391.

THE ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO,
Plaintiff,

vs.

THE DENVER & RIO GRANDE RAILROAD COMPANY, Defendant.

Comes now the said plaintiff, by its attorneys, Messrs. Catron and Gortner, and A. B. Renchan, Esq., and comes likewise the said defendant, by its attorneys, Messrs. Abbott and Abbott, and the mandate of the Supreme Court having been filed in this court and cause, duly authenticated under the seal of the said Supreme Court, and dated the fifth day of March, A. D. 1906, whereby it appears that at the January, 1906, term of said Supreme Court, that is to say, on the 21st day of said term the judgment of the said Supreme Court was entered and rendered, whereby it was commanded that this court do re-instate the above entitled cause upon the docket of this court and do proceed in accordance with the decision of the said Supreme Court, a copy of which is attached to the said mandate, and said plaintiff, by its attorneys, thereupon moving to that end;

It is considered, ordered, adjudged and decreed that the said cause above entitled, which was removed from this Court upon said appeal, be and the same is hereby reinstated upon the docket of this court, in accordance with the said mandate; that, in accordance

with the said decision and mandate, the order of this court heretofore made and entered of record on the 2nd day of June, A. D., 1905, sustaining the demurrer of the said *plaintiff* to the complaint of said plaintiff, and dismissing the said cause, be and the same is hereby reversed, set aside, cancelled and annulled, and in lieu thereof, it is considered, ordered adjudged and decreed that the said demurrer of the said defendant to the complaint of plaintiff be and the same hereby is overruled. And it is thereupon, on motion of plaintiff, ordered that defendant do plead to the said complaint of plaintiff, within twenty days from this date.

JOHN R. McFIE,
Judge, etc.

Which said order is endorsed in words and figures as follows, to-wit:

No. 391. San Juan County. The Arizona & Colorado R. R. Co. of New Mexico, vs. The Denver & Rio Grande R. R. Co. Order. Filed in my office March 27, 1906. A. M. Bergere, Clerk, R. B. P. 303.

And thereafter and on to-wit the 7th day of April, 1906, there was entered of record a certain order which order is in words and figures to-wit:

No. 391.

THE ARIZONA & COLORADO RAILROAD CO. OF NEW MEXICO
vs.
THE DENVER & RIO GRANDE RAILROAD COMPANY.

118 Upon motion of defendants and for cause shown the time given defendants within which to plead is hereby extended ten days in addition to the time originally granted.

JOHN R. McFIE,
Judge, etc.

Which said order is endorsed in words and figures as follows to-wit:

No. 391. District Court. San Juan County. The Arizona & Colorado Railroad Co. of New Mexico Plaintiff, vs. The Denver & Rio Grande Railroad Co., Defendant. Order extending time to plead. Filed in my office, April 7, 1906. A. M. Bergere, Clerk. R. B. P. 304. Abbott & Abbott, Santa Fe, N. M. J. F. Baile, Denver.

And thereafter and on to-wit the 22nd day of May, 1906, there was entered of record a certain order, which order is in words and figures, to-wit:

No. 391.

THE ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO
vs.
THE DENVER & RIO GRANDE RAILROAD COMPANY.

This cause having come on to be heard this 22nd day of May, 1906, at Taos, in the County of Taos and Territory of New Mexico, upon the motion of the plaintiff for a change of venue of said cause to the next nearest judicial district or some county thereof, and the court being satisfied in the premises.

It is ordered that the venue of the said cause be and the same hereby is changed to the Second Judicial District, the same being the next nearest judicial district to that in which the said cause is pending, and the same is changed to the County of Bernalillo in said Second Judicial District.

119 It is further ordered that the Clerk of this Court make and transmit to the Clerk of the District Court of the Second Judicial District, for the County of Bernalillo, a true and correct transcript of all docket and record entries in said cause and that he also transmit to said Clerk of the Second Judicial District for the County of Bernalillo all and singular the original files of said cause in this Court.

It is further ordered that the costs of said change of venue shall be paid by the plaintiff in said cause.

Messrs. Catron and Gortner and A. B. Renahan were heard in favor of said motion and E. C. Abbott against the same.

JOHN R. MCFIE,

Judge, etc.

To which above order defendant excepts, E. C. Abbott, attorney for defendant.

Which said order is endorsed in words and figures as follows to-wit:

No. 391. San Juan County. Arizona & Colorado Rd. Co. vs. Denver & Rio Grande Rd. Co. Order Changing Venue. Filed in my office May 23, 1906. A. M. Bergere, Clerk.

TERRITORY OF NEW MEXICO,

County of San Juan:

I, A. M. Bergere, Clerk of the District Court of the First Judicial District of the Territory of New Mexico, in and for the County of San Juan, do hereby certify that the above and foregoing twelve pages contain a true, complete and correct copy and transcript of docket in cause No. 391, entitled The Arizona & Colorado Railroad Company of New Mexico vs. The Denver & Rio Grande Railroad Company, the same being in Civil Docket 2 of the said County of San Juan within the first Judicial District; and of the orders as filed and entered of record in Book C of the said County of San Juan,

as they now appear on said docket and record. The same being all of the record entries in said cause.

120 I further certify that I herewith transmit to the Clerk of District Court of the Second Judicial District of the Territory of New Mexico, in and for the County of Bernalillo, all the papers in said cause, numbering 18, on this the 1st day of June, A. D. 1906.

In witness whereof I have hereunto set my hand and official seal at my office in Santa Fe, N. M., this 1st day of June, A. D. 1906.

[SEAL.]

A. M. BERGERE, *Clerk*.

And thereafter, on to-wit, the 4th day of June, 1906, there was filed in the office of the Clerk of said Court in said cause a Motion for appointment of Examiner, which said motion was in words and figures as follows, to-wit:

In the District Court in and for the County of Bernalillo in the Second Judicial District of the Territory of New Mexico.

ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO,
Plaintiff,

vs.

DENVER & RIO GRANDE RAILROAD COMPANY, Defendant.

Now comes plaintiff and exhibiting to the court here the pleadings and records in this cause represents to the court that the issues herein will require the taking of testimony at various points in the Territory of New Mexico, at the Counties of McKinley, Bernalillo, Santa Fe and San Juan; that the testimony to be offered in said cause

121 will be quite voluminous; and that in order to take the same, it will be necessary to have an examiner appointed by the court; with authority to summon witnesses, and to conduct hearings in said cause at various points in said Territory;

Wherefore plaintiff moves the Court to appoint and designate some suitable person as examiner or referee in said cause, to take the testimony and receive the proofs that may be offered by the parties herein, and to report the same to this Honorable Court, without, however, making any findings of fact or law thereon.

RITTER & BUCHANAN,

A. B. RENEHAN,

H. B. FERGUSON,

CATRON & GORTNER,

Attorneys for Plaintiff.

Abbott & Abbott, Esqs., Attorneys for Defendant, Santa Fe, N. M.

Please take notice of the foregoing motion and that the same will be called up before *his* Honorable Ira A. Abbott, Associate Justice, etc., at Chambers in the City of Albuquerque, County of Bernalillo.

at ten o'clock a. m. on Thursday, June 7th, 1906, or as soon thereafter as counsel may be heard.

RITTER & BUCHANAN,
A. B. RENEHAN,
H. B. FERGUSSON,
CATRON & GORTNER,
Attorneys for Plaintiff.

Duplicate hereof mailed this day to Abbott & Abbott, Santa Fe, N. M., June 2nd, 1906.

R. C. GORTNER.

Endorsed: Filed in my office this June 4, 1906. W. E. Dame, Clerk.

And thereafter on to-wit, the 28th day of June, 1906, there was filed and entered of record in the office of the Clerk of said Court, an order granting the Motion to Appoint Referee, which said order was in words and figures as follows, to-wit:

In the District Court in and for the County of Bernalillo in the Second Judicial District of the Territory of New Mexico.

No. 7121.

ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO,
Plaintiff,

vs.

DENVER & RIO GRANDE RAILROAD COMPANY, Defendant.

Chancery.

This cause coming on to be heard on the motion heretofore filed by the plaintiff herein, and the parties herein having appeared by their respective solicitors to be heard upon said motion, and the same having been fully argued to the Court by said solicitors respectively and the Court having maturely considered the same and being fully advised in the premises, it is therefore by the Court ordered that the said motion be, and the same is hereby granted, and C. E. Burke of Santa Fe, New Mexico, is hereby appointed Referee and Examiner in this cause, with authority to conduct hearings for the purpose of taking testimony herein at such points in said Territory as may be convenient to the respective parties in putting in their evidence; to summon witnesses to attend such hearings at such points as he may designate and to administer oaths to witnesses. It shall be his duty to take such testimony as may be offered by the parties to this cause, reduce the same to writing and with all convenient speed return the same to this court, but without making either findings of fact or conclusions of law on such evidence.

Counsel for defendant having prayed an exception to the action of the Court in granting said motion and making this order, such exception is allowed and noted in this order.

IRA A. ABBOTT,
Judge, etc.

Endorsed: Filed in my office this June 28, 1906. W. E. Dame,
per A. C. H., Deputy.

124 And thereafter, on to-wit, the 8th day of December, 1906, there was filed in the office of the Clerk of the said Court in said cause the Report of Referee and Examiner, which said Report was in words and figures as follows, to-wit:

No. 7121.

ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO,
Plaintiff,

vs.

THE DENVER & RIO GRANDE RAILROAD COMPANY, Defendant.

Chancery.

Report of Referee.

125 I, the undersigned, Edward C. Burke, Referee and Examiner in the above entitled cause, duly appointed by the Honorable Second Judicial District Court, in and for the County of Bernalillo, in the Territory of New Mexico, as such Referee and Examiner, in the above entitled cause, as by the record in said cause appears, do hereby report unto said Honorable Court that having been so appointed I qualified and took the oath of office as such Referee and Examiner on the 29th day of June, A. D. 1906, which said oath of office is herewith returned and made a part of this report; that thereupon I proceeded to take and receive the evidence offered by the parties in said cause holding sessions and hearings for such purposes, first at Aztec, in the County of San Juan, in said Territory; second, at Deming, in the County of Luna, in said Territory; third, at Santa Fe, in the County of Santa Fe, in said Territory; fourth, at Aztec, in the County of San Juan, in said Territory, and finally, according to stipulation as appears in the foregoing transcript closing the said cause in an informal session held at Santa Fe in the County of Santa Fe, Territory of New Mexico; that the said hearings were held on the dates stated and set forth in the foregoing transcript thereof, and were duly held according to notices therefor, issued by the undersigned and according to the agreement of the parties to said cause upon such dates; that at the said hearings the witnesses stated therein were duly produced, sworn and examined and testified under oath as set forth in the said transcript; each of said witnesses signing and swearing to his said testimony at the close thereof as shown by the said transcript; and that the said transcript

is a true, complete, verbatim and accurate report of the testimony of said witnesses and each thereof, as so given and of the said examinations and hearings and of all the proceedings, motions, objections and stipulations, made in the progress of said cause before the undersigned, at the said hearings; that there were offered in evidence

by the parties to said cause various exhibits, which are truly
126 and correctly listed in the said transcript on pages immediately following the index to the testimony of the witnesses; set forth at the beginning of the said transcript, which said exhibits are further specifically mentioned and described as introduced, and identified by exhibit numbers, throughout the course of the said transcript, and the said original exhibits, so marked and identified are herewith returned with this report into the said honorable Court, together with the said transcript of testimony and proceedings.

And the undersigned, Referee and Examiner, states and certifies that in the taking of said testimony he served 28 days of six hours each, according to the statute in such cases made and provided, for which his charge is \$280; that he issued in the course of said proceedings notices for six hearings, two of which were postponed at the request of the defendants, for which there is taxable a charge of \$6 in all; that in said proceedings he administered the oath to 24 witnesses, for which the statutory fee taxable to him is 25 cents each or \$6; that in said proceedings at the request of the parties as shown by the record there were taken 18 adjournments, for which according to the statute there is taxable in favor of said Referee and Examiner \$1 each, or \$18 in all; that he furnished and made as hereinbefore transmitted the original transcript of the proceedings in said cause consisting of 1,091 pages, and containing 3,819 folios, for which there is taxable in favor of said Referee and Examiner 15 cents per folio, or \$572.85; that he furnished to each of the parties, plaintiff and defendant, at the request of each of said parties, a copy of the said transcript, for which said two copies there is taxable to and in favor of said Referee and Examiner 5c. per folio, or a total of \$381.90; that he has now made and filed this, his report, herein,

for which there is taxable in his favor the sum of \$1.50; that
127 in the taking of said testimony and in holding the said sessions therefor he necessarily incurred expenses for railroad fare to and from Aztec, New Mexico, on August 1, 2, 3 and 4, and for hotel at Aztec, New Mexico, at said time, in the sum of \$49.85; that he further incurred expenses for railroad fare to and from Deming, New Mexico, August 15, 16, 17 and 18 and for hotel at said time and place in the sum of \$49.40; that he necessarily incurred expenses for railroad fare to and from Aztec, New Mexico, for the purposes of the hearing October 23rd, to November 1st, 1906, and for hotel at said time and place, and for janitor's services in providing and caring for the quarters for said session, including fuel, lights, etc., in the aggregate sum of \$71.65; that the last named expenditures for traveling and hotel and janitor's services were necessarily incurred at the request of the plaintiff and defendant in said cause, and that the said charges were reasonable, proper and necessary; that the aggregate of the aforesaid items is \$1,437.15, for

which sum the undersigned asks that an allowance and charge be made by the court and taxed as a part of the costs in this proceeding.

Wherefore, having now completed his services in the above entitled cause and having fully complied with the order of the Court, appointing him as above mentioned, the undersigned herewith returns into Court the said transcript of proceedings, and the said exhibits, accompanying the same and identified therein, with this, his report; and prays to be hence discharged.

Respectfully,

E. C. BURKE,
Referee and Examiner.

December 4th, 1906.

128 The Arizona & Colorado Railroad Company of New Mexico
vs. The Denver & Rio Grande Railroad Company to Ed-
ward C. Burke, Referee and Examiner:

To 28 days' services as Referee and Examiner at \$10 per diem, 6 hours per day.....	\$280.00
To notices for 6 hearings, 2 postponements, at \$1 each..	6.00
To swearing 24 witnesses at 25 cents each.....	6.00
To 18 adjournments, at \$1 each.....	18.00
To furnishing original transcript of proceedings taken in above entitled cause, 1091 pages, 3819 folios, at 15 cents	572.85
To furnishing two extra copies of proceedings, one to plaintiff and one to defendant, 1091 pages, 3819 folios, 5 cents 2 copies	381.90
To filing report.....	1.50
To expenses, railroad fare and hotel, Aztec, August 1, 2, 3 and 4	49.85
To expenses, railroad fare and hotel, Deming, Aug. 15, 16 and 17	49.40
To expenses, railroad fare and hotel, janitor service, etc., Aztec, Oct. 23, 24, 25, 26, 28, 29, 30, 31 and Nov. 1....	71.65
	<hr/>
O. K.	\$1437.15

CATRON & GORTNER,

Att'ys for Pl'tff.

Received payment,

TERRITORY OF NEW MEXICO,

County of Santa Fe, ss:

Personally appeared before me, the undersigned, Edward
129 C. Burke, who, being by me duly sworn, deposes and says
that the items as above enumerated give a correct and true
account of moneys expended in the above entitled cause; and that
the other items are true and correct, as the same are regulated by
the statutes of New Mexico.

E. C. BURKE.

Sworn and subscribed before me this 24th day of November, A. D., 1905.

[SEAL.]

P. F. KNIGHT,
Notary Public.

Endorsed: Filed in my office this Dec. 8th, 1906, John Venable, Clerk.

And thereafter, on to-wit, the 29th day of December, 1906, there was filed in the office of the Clerk of said Court in said cause, Objections to Report of Referee and Examiner, which said Objections were in words and figures as follows, to-wit:

In the District Court.

TERRITORY OF NEW MEXICO,
County of San Juan, ss:

THE ARIZONA & COLORADO RAILROAD CO. OF NEW MEXICO

vs.

THE DENVER & RIO GRANDE RAILROAD COMPANY.

Objections to the Report of the Referee and Examiner.

Now comes the defendant, the Denver & Rio Grande Railroad Company, and at this time, after the taking of the evidence of the case, and before the hearing of the argument thereon, renews its objection heretofore made and entered, and objects to the further consideration of said case upon the pretended report of the alleged referee and examiner therein for the following reasons:

First. That under the code of practice of the Territory of New Mexico and the Acts of Congress confirmatory thereof, the Court was without jurisdiction and power to appoint, authorize and empower a referee and examiner to take the evidence in said cause and report the same to the Court.

Second. That the Statutes of New Mexico furnish a uniform and complete course of proceeding for all cases in which a referee is by law authorized; and that such fact precludes the right to substitute or employ any other course.

Third. That it is clear under the pleadings in said cause that the case at bar does not fall within the purview or contemplation of the said uniform course of proceeding so provided by the statutes of New Mexico, and confirmed by Congress in this:

1st. They do not disclose "Issues of fact that require the examination of a long account upon either side," and

2nd. They do not show that the "taking of an account is necessary for the information of the Court before judgment."

Fourth. That the taking of the evidence by the pretended referee has not developed any fact other than those set forth in the pleadings, requiring a reference in the cause.

Fifth. That the party defendant herein did not consent to
131 the appointment of a referee, but protested against said appointment before the same was made, and excepted to the action of the Court in making the same; and again protested and excepted when the pretended referee and examiner began taking of evidence; and now here objects to the consideration by the Court of any report filed by said pretended referee and examiner, or which may hereafter be filed by him, in said cause; for that the said appointment was without authority of law and therefore void; and because said defendant has never waived said objection, and has never acquiesced in, nor ratified said appointment.

Sixth. That the evidence as taken in said cause by said pretended referee fails to disclose the necessity for "the examination of a long account on either side," no account having been produced by either side for examination; and no request having been made by either side to the said pretended referee, for the examination of any account of any kind whatever.

Seventh. The evidence fails to show that the taking of an account is necessary for the information of the Court before judgment, or for carrying a judgment or order into effect.

Eighth. That no fact other than those appearing upon the pleadings has arisen in the taking of evidence, or upon motion or otherwise requiring the consideration of a referee.

Ninth. Because the complete "course of proceedings" provided by statute, and composed in Sub. Sec's 138 to 158 inclusive, of General Section 2685 of the Compiled Laws of New Mexico for 1897, with the additions and amendments thereto, is exclusive, and does not allow the appointment of referees in any other cases or under any
132 other circumstances than those therein named and described, and because said "course of proceedings" is authorized, validated and confirmed by Act of Congress.

Sec. 1 and preamble thereto, 1st column of p. 58, Compiled Laws of 1897.

Tenth. That plaintiff by its evidence has disavowed any other purpose in this action than to compel defendant to remove the track of its constructed and operated line at the points and places of intersection and interference with plaintiff's surveyed line; and that an action for such purpose prior to the doing of any construction work in the Territory of New Mexico is premature and improvidently brought; the evidence as taken by said referee, showing that not a rod of railroad on said line has been constructed in the Territory of New Mexico.

Eleventh. That to render a judgment requiring the removal of the track of defendant's line at any period prior to a time when such track might be an actual obstruction in the way of construction of a railroad on the line of plaintiff's survey, would be an idle thing which the Courts will not do.

Twelfth. That the evidence of plaintiff as taken by said pretended referee shows that plaintiff had not, at the commencement of this action, acquired a right-of-way over which to construct its proposed railroad; having only procured options which it might

forfeit at pleasure; and said evidence also shows that many of such options have long since expired; and that all of the evidence of plaintiff taken as a whole, fails to evince any such faith as to warrant this Court in rendering any judgment whatever in its favor.

Wherefore, Defendant excepts to said report of said pretended referee and objects to any affirmative judgment for plaintiff by this Court thereupon; and asks that said report be stricken from the files of said cause.

ELROY N. CLARK,
REESE McCLOSKEY, AND
ABBOTT & ABBOTT,
Attorneys for Def't.

Endorsed: Filed in my office this Dec. 29, 1906, John Venable, Clerk.

134 And thereafter, on to-wit, the 20th day of December, 1907, there was filed and entered of record in the office of the Clerk of said Court in said cause, Findings of Fact and Conclusions of Law made by the Court at the request of the Plaintiff's counsel, which said Findings, etc., were in words and figures as follows, to-wit:

In the District Court in and for the County of Bernalillo, in the Second Judicial District of the Territory of New Mexico.

No. 7121.

THE ARIZONA & COLORADO RAILROAD CO. OF N. M., Plaintiff,
vs.
THE DENVER & RIO GRANDE RAILROAD COMPANY, Defendant.

Finding of Facts.

The above entitled cause having been submitted to the Court upon the pleadings, and the proofs taken therein, and the arguments of counsel, the Court doth thereupon find the following facts:

1st. That on the 6th day of October, 1904, the plaintiff, The Arizona & Colorado Railroad Company of New Mexico, filed in the office of the Secretary of the Territory of New Mexico its articles and certificates of incorporation, with all necessary and proper papers and instruments in connection therewith, and paid all fees and charges required by law, and fully and duly complied with the provisions of law to complete its organization and incorporation under the laws of the Territory of New Mexico, and then became
135 and ever since has been a corporation duly organized and existing under and by virtue of the laws of the Territory of New Mexico, authorized to lay out, locate, acquire, construct and maintain the lines of railway in its articles of incorporation aforesaid mentioned, and to purchase, acquire, take and hold property and rights-of-way and do such things as were necessary and proper

for the purpose of location, construction, maintenance and operation of such lines of railroad.

2nd. That by the terms of its charter the plaintiff became and is authorized and empowered to locate, acquire, build, construct and maintain a line of railroad from a point on the boundary line between the State of Colorado and the Territory of New Mexico, at or near the point where the Las Animas River crosses the same, in the County of San Juan, Territory of New Mexico, to a point on the boundary line between the Territory of New Mexico and the Territory of Arizona, at or near where the San Francisco river intersects said boundary line, about three miles north of the Grant County line; that a portion of the line above described extends from the said point on the boundary line between the State of Colorado and the Territory of New Mexico, down the Animas Valley, in a general southerly and southwesterly direction, to the town of Farmington, in the County of San Juan, in the Territory of New Mexico; this being the portion of said line of railroad of the said plaintiff which is in controversy in this proceeding.

3rd. That immediately upon its organization as aforesaid the plaintiff company proceeded with the survey and location of a line of railroad down the said Animas Valley between the said points, and layed out, located and marked upon the ground by stakes set in the ground a line of railroad between the said points, to-wit, between the boundary line of the State of Colorado and the Territory of New Mexico, and the town of Farmington, in said Territory of New Mexico, and prior to the 1st day of January, 1905, adopted the said line so surveyed, located and marked upon the ground, as the line of the definite location of its railroad between said last mentioned points.

4th. That on the 13th day of May, 1905, the plaintiff company filed in the office of the Secretary of the Territory of New Mexico a map and profile of its said line between the boundary of the State of Colorado and the Territory of New Mexico, and the said town of Farmington, and of the land required and taken for the use of such line, and of the boundaries of the several Counties through which the same runs, and also filed in the office of the Probate Clerk and Recorder of San Juan County, New Mexico, in which said line of road is situate, a similar map, on the 23rd day of May, 1905; which said line shown on the said map is the same line so located and adopted by plaintiff and claimed by it, and in controversy in this proceeding.

5th. That on the 27th day of October, 1904, the plaintiff duly filed in the United States land office at Santa Fe, New Mexico, its duly certified map of that portion of the said line north of the town of Farmington aforesaid, so located and adopted by it, which lies between a point north of and near the town of Aztec in said County of San Juan, and the said boundary between Colorado and New Mexico, which map was duly approved by the Secretary of the Interior on the 1st day of April, 1905; and that no part of the said line of the plaintiff company in controversy in this proceeding and south of the said southern terminus of the said map and plat so filed

in the said United States Land Office passes over or crosses any public land, between the said point and the said town of Farmington.

6th. That in connection with the survey, location and adoption of the said line of railroad of the plaintiff company, between the boundary of Colorado and New Mexico, and the town of Farmington aforesaid, and as soon as its said line had been definitely located, the plaintiff company entered into negotiations with the several owners of the lands and premises crossed by said line, for right-of-way, and was able to agree and did agree with substantially all the owners of such lands as to the compensation to be paid by plaintiff company for the taking and occupation of such land by and for the use of the said railroad, and secured from practically all of such others options and agreements in writing authorizing it to enter upon and take such land for the purpose of construction, operation and maintenance of the said line of railroad upon payment of the compensation fixed by said several agreements; and that prior to the time when the defendant company had made any location of its line of road over any of the lands where a conflict occurs or there is a controversy in this case between plaintiff and defendant, and prior to the time when defendant had acquired or attempted to acquire any right-of-way across such lands, the plaintiff company had secured from all such owners of such last mentioned lands written agreements or options fixing the compensation to be paid such owners by plaintiff for the taking of such lands, except only in the case of W. H. Whitney and W. W. McEwen; and that in both of the latter cases, the plaintiff company had verbally agreed with the said Whitney and the said McEwen as to the amount of such compensation which they would require for the constructing and maintenance of the said line of railroad of plaintiff across their said lands, and agreements or options in writing embodying such agreement had been drawn up, prepared and signed by the said land owners, but that such written agreements were not delivered to plaintiff company.

7th. That in the survey, location, adoption and acquisition of the said line between said points hereinbefore stated, the plaintiff company proceeded with due diligence and in good faith, and that the line so located and adopted by it was selected after careful survey and examination and after preliminary investigation and reconnaissance, by competent and skilled engineers, as the best line for the construction, maintenance and operation of plaintiff's road between said points, and that the line so selected was and is a practicable and feasible line for the construction, maintenance and operation of such road; and was and is the best line and the best line obtainable between said points.

8th. That immediately upon the completion of the surveys of the said line of road of plaintiff, north of the said town of Farmington, hereinbefore mentioned, the plaintiff company proceeded with due diligence and in good faith with its surveys extending southward from the said town of Farmington to the point on the boundary between the Territories of New Mexico and Arizona, near where the San Francisco river crosses the same, and in its articles

of incorporation mentioned, and marked and staked on the ground its line of definite location from said town of Farmington to the said southern terminus, and located and adopted said line, and caused proper plats thereof to be duly filed with the proper government officials and to be approved so as to secure a right-of-way for such line over the public lands and over the Indian Reservation crossed by the same, and within a reasonable time caused to be filed in the office of the Secretary of the Territory of New Mexico and in the offices of the Probate Clerks and Recorders of the several Counties through which said line runs, due and sufficient maps, plats and profiles of said line and the land required to be taken for the use thereof and the boundaries of the several Counties through which the same runs, as by law provided; and took all necessary and proper steps to acquire said right-of-way for the construction, maintenance and operation of its said line of railroad between said
139 points; and that such line, in connection with the plaintiff's said line extending northward from said town of Farmington, and hereinbefore mentioned, constitutes a continuous line between a point on the boundary line of the State of Colorado and the Territory of New Mexico, at or near where the Las Animas river crosses the same in San Juan County, New Mexico, and a point on the boundary line between the Territories of Arizona and New Mexico, at or near where the San Francisco river crosses the same, about three miles north of the Grant County line, a distance and length in all of about one hundred and sixty miles.

9th. That in the survey and location of its lines of road in the Territory of New Mexico and in selecting and determining the most satisfactory line therefor, and in securing rights-of-way therefor, the plaintiff company has laid out and expended a sum in excess of one hundred thousand dollars, prior to the institution of this action.

10th. That prior to the organization of the plaintiff company, and in the year 1902, there had been organized in the Territory of Arizona, in pursuance of and due conformity to the laws of that Territory, a corporation known as the Arizona & Colorado Railroad Company, by substantially the same persons who afterwards organized the plaintiff company, and the said Arizona & Colorado Railroad Company, prior to the organization of the plaintiff company had made certain preliminary investigations and reconnaissances for the purpose of determining the feasibility of the construction of a railroad line through the Territories of Arizona and New Mexico and into the State of Colorado, along substantially the same route and line as afterwards located and adopted by the plaintiff company and by the Arizona & Colorado Railroad Company of Colorado hereinafter mentioned; and as the result of these investigations the

plaintiff company was organized as hereinbefore set out and there was also organized and incorporated in the State of
140 Colorado, in the year 1904, in pursuance of and due conformity to the laws of that State, a corporation known as the Arizona & Colorado Railroad Company of Colorado, by substantially the same persons who had theretofore organized the same Arizona company, known as the Arizona & Colorado Railroad Company,

and who also organized the plaintiff company, which said Colorado corporation was organized for the purpose of locating, constructing, maintaining and operating that portion of the proposed line of railroad situate within the State of Colorado; and that the said several corporations were organized for the purpose of constructing a continuous system and line of road extending into the Territories of New Mexico and Arizona and the State of Colorado.

11. That the said Arizona corporation hereinbefore mentioned, under and pursuant to its charter, caused to be surveyed, located, staked and marked on the ground and to be adopted as its definite line of location, a line of road extending from Globe, in the Territory of Arizona, to the point on the boundary line between Arizona and New Mexico at or near where the San Francisco river crosses the same, at a point about three miles north of the Grant County line, and to a connection with the line of road surveyed, located and adopted by the plaintiff company, and hereinbefore mentioned; and that the said Colorado corporation hereinbefore mentioned, under and pursuant to its charter, caused to be surveyed, located, staked and marked on the ground and to be adopted as its definite line of location, a line of road extending from the city of Durango, in the State of Colorado, to the point on the boundary line between Colorado and New Mexico at or near the point where the Las Animas river crosses the same, in San Juan County, New Mexico, and to a connection with the line of road surveyed, located and adopted by the plaintiff company, and hereinbefore mentioned; and that the

141 said lines so located and adopted by the Arizona & Colorado corporations aforesaid, together with the line located and adopted by the plaintiff company as hereinbefore set out, will, when built upon as proposed, constitute a system and continuous line of road from the city of Durango in the State of Colorado to the city of Globe in the Territory of Arizona, a distance of about four hundred and eighty-five miles.

12th. That the said Arizona corporation aforesaid, has constructed a few miles of road in the Territory of Arizona, and in the construction of such road and in the survey and location of the line hereinbefore mentioned, and in its preliminary investigations and reconnaissances and survey for the purpose of determining the feasibility of the construction of the said line hereinbefore mentioned through to said city of Durango, has expended about the sum of four hundred thousand dollars; and that the said Colorado corporation, in its surveys and locations, has expended the further sum of about forty thousand dollars; that the said surveys and locations of the said line by the said several companies between the said Globe, Arizona, and Durango, Colorado, were made pursuant to and under a common intent and purpose of selecting and obtaining a line for the construction of a continuous line of railroad between said points.

13th. That in the matters and things aforesaid, and in the survey, location and selection of the said line of road, the plaintiff company and the allied corporations aforesaid appear to have proceeded in good faith and with due diligence, in the selection of the said line of road between said points, and appear to have complied with the laws

of the several States and Territories with respect to such surveys, location, selection and adoption of the said line of road; that the survey, location and adoption of that portion of plaintiff's line in controversy in this action, by the plaintiff company, was had, made and done long prior to any survey, location or adoption of any line of road by the defendant company in the said County of San Juan, Territory of New Mexico.

14th. That after the survey, location and adoption of the plaintiff's said line from the boundary of Colorado and New Mexico to the town of Farmington, as aforesaid, and with knowledge that said line had been and then was marked and staked on the ground, and, on to-wit, about the first day of February, 1905, the defendant company began at a point in the State of Colorado, about three miles from the city of Durango, and upon its then existing line of railroad in said State, the construction of a line of railroad down the Animas Valley in the direction of the said town of Farmington, and thereupon in an inclement season, with great haste, prosecuted its work of construction in a southerly direction, following its surveying and engineering parties closely with its grading and track-laying forces.

15th. That prior to the institution of this suit, and early in the month of April, 1905, and before any construction work had been done by defendant in the Territory of New Mexico, when it appeared probable from the course being taken by the defendant's engineers that a conflict between the plaintiff and defendant companies might arise, the plaintiff's engineer in charge of its lines and work brought its survey and location to the attention of the chief engineer of the defendant and requested a conference with a view to preventing any conflict between the two companies with respect to such lines; which notice and request was ignored by the defendant company and no attention appears to have been paid to it by defendant.

16th. That at the time of the institution of this suit, the defendant company was threatening to trespass upon and enter upon and take, in numerous places between the northern boundary of New Mexico and the town of Farmington, portions of the line so located and adopted by the plaintiff company, and the engineering forces of defendant's company had laid out its line of road so as to interfere with and take said portions of the line claimed by plaintiff, but defendant company had not at that time begun the grading of its road or the laying of track or ties at any of the said points in conflict, but was approaching such points with its construction forces and was threatening to and was about to enter in and upon said portions of said line of plaintiff and to construct its own line of road thereon, without reference to the rights of plaintiff company and without reference to the grade or alignments adopted by plaintiff at such point; and defendant was preparing to file numerous condemnation suits against the owners of the premises where the lines surveyed by plaintiff and defendant conflicted; the said points of conflict being as follows, to-wit:

On the land of W. H. Whitney, in the N. E. $\frac{1}{4}$ of Section 33, Tp. 32 N., R. 10 W., N. M. P. M.; on the land of W. W. McEwen, on the S. E. $\frac{1}{4}$ of Section 5, Tp. 31 N., R. 10 W., N. M. P. M.; on

the land of Edith B. M. Young, in the W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ and the southeast quarter of the southwest quarter of Section Eighteen, Township Thirty North, Range Eleven West, N. M. P. M.; on the land of F. M. Quinn, in the northwest quarter of Section 32, in Township Thirty North, Range Twelve West, N. M. P. M.; on the lands of M. B. Hendrickson, in the northwest quarter of Section Six, Township twenty-nine North, Range Twelve West, N. M. P. M.; on the lands of T. R. Bouseman, in the southeast quarter of Section Six, Township Twenty-nine North, Range Twelve West, N. M. P. M.; on the lands of Wayne Walling, in the southwest quarter of the northwest quarter, and the west half of the southeast quarter, of Section Eleven, Township Twenty-nine North, Range Thir-

144 teen West, N. M. P. M.; on the lands of Julia A. Miller, in the west half of the northwest quarter of Section Fifteen, Township Twenty-nine North, Range Thirteen West, N. M. P. M.

17th. That the line so surveyed by the defendant company and which it threatened to and was then about to construct unnecessarily and wilfully was laid out so as to cross and recross the line of plaintiff so located and adopted by it as aforesaid, at acute angles, no less than eight times, in a distance of about twenty-seven miles, and that at the time of the institution of this action it was apparent that the construction of the said threatened trespasses of the defendant would destroy the said line of road so located and adopted by the plaintiff.

18. That at the time the survey and location of said portion of its line were made by the defendant company the stakes and markings on the ground, showing the line of plaintiff's said location through said premises, were plainly discernible and visible, and the markings were such as to indicate clearly to the railroad engineers of the defendant the existence of a line of definite location of railroad across the said premises, along the line so marked.

19th. That at the time said surveys were being made by defendant, and particularly at the said points of conflict above stated, the engineers of the defendant company were notified by various of the land owners above mentioned of the existence and location of the said line so located and adopted by plaintiff, across their premises, and that they had entered into agreements in several cases; and that the survey of that portion of the defendant's line south of the Bousman place above mentioned, and between that place and the town of Farmington, was made by the same engineer who had theretofore, while in the service of plaintiff, surveyed and located the said line so adopted by plaintiff, between said points as aforesaid.

145 20th. That after the dissolution of the preliminary injunction in this case, and after the execution of the bond required by the Supreme Court of the Territory of New Mexico, to be given by the defendant company, as a condition for withholding the restraining order restraining defendant from proceeding to construction upon the points and places in conflict between the said plaintiff and defendant, the defendant company proceeded with the construction of its said railroad down the said Animas Valley to

the said town of Farmington, and laid ties and rails upon the grade constructed by it, and in about the month of September, 1905, had said road in operation and was running trains thereon, and has since continued to operate the said road along the line so constructed by it to said town of Farmington and is now engaged in the operation thereof.

21st. That in the construction of its said road, the defendant followed substantially the line as laid out by it at the time of the institution of this suit, except that the crossing on the premises of Wayne Walling aforesaid was eliminated and a new crossing was introduced on, to-wit, the northeast quarter of Section Fifteen, Township Twenty-nine North, Range Thirteen West, N. M. P. M., on the premises known as the Kite or Depew place, and also on the premises known as the northwest quarter of Section Fifteen, Township Twenty-nine North, Range Thirteen West, and in the northeast quarter of Section Eleven and the northwest quarter of Section Twelve, in the same township and range, said premises being known as the McCarty and Southerland lands, the defendant so constructed its road as to encroach upon the right-of-way of plaintiff for a distance of about nine hundred feet in the first instance and about fifteen hundred feet in the second.

22nd. That in the construction of the said road, the defendant, as it has threatened by its said surveys to do, ignored the grades adopted by the plaintiff at the said points of conflict and so constructed its road upon different grades from those adopted by plaintiff, at the said points of conflict, and at such angles of intersection of the said line, as to take and occupy longitudinally a large part of the line so adopted by plaintiff, and so as to destroy for practical purposes of railroad construction, between the said town of Farmington and the most northerly of said crossings, to-wit, that on the said Whitney place, the said line so located and adopted by the plaintiff company as aforesaid; and that in so constructing the said line of railroad the defendant company acted with full knowledge or means of knowledge of the said plaintiff's proceedings and doings with reference to the location and adoption of its line of road, and the rights therein acquired by said plaintiff, and acted in utter disregard thereof.

23rd. That it does not appear when, if at all, the defendant company adopted the line upon which its said road was constructed as aforesaid, and no plat or profile of said line was filed by said defendant company at any time prior to the actual construction thereof or at any time before December 12th, 1905; and that it does not appear that any declaration of intention to build the said line of railroad was at any time ever filed by the defendant company in the office of the Secretary of the Territory of New Mexico or of the Probate Clerk and Recorder of said San Juan County, New Mexico.

24th. That defendant is a foreign corporation organized under the laws of the State of Colorado, and that it appears that the only copy or purported copy of its articles of incorporation filed in the office of the Secretary of the Territory of New Mexico, was not signed

and does not purport to contain the signatures or a copy of the signatures of any of the incorporators.

147 25th. That immediately after the dissolution of the preliminary injunction in this case, the defendant as it was alleged in the complaint it was threatening to do, instituted in the District Court of the First Judicial District of the Territory of New Mexico, in and for the County of San Juan, a number of condemnation suits affecting the premises in controversy between the parties in this case, to-wit: No. 380, against Edith B. M. Young et al.; No. 394, against Frank M. Quinn, et al.; No. 395, against Marion B. Hendrickson, et al.; No. 403, against William Southerland, et al.; No. 404, against James McCarthy, et al.; No. 406, against Allison F. Miller, Julia A. Miller, et al., and No. 407, against Wayne Walling, et al., all of which proceedings except that against Wayne Walling are now pending and undetermined in said Court; the same being instituted by defendant for the purpose of obtaining title or a right to construct its said road upon the premises in controversy in this suit.

26. That prior to making the first crossing of plaintiff's line, as hereinbefore set out, defendant's line lay upon the east side of the line located by plaintiff, and that after making all of the various crossings and interferences by defendant, the terminus of defendant's line in the town of Farmington is again on the easterly and same side of plaintiff's line, on which it was located prior to making the first crossing aforesaid; that the valley of the Animas River between said points is a comparatively wide, level valley, with room for the construction of two or more railroads without interference with each other, and that no necessity or sufficient reason existed for any crossing of plaintiff's line by the defendant's company, or any interference therewith, between said points.

148 27th. That it is apparent from the fact (to say nothing of the other evidence bearing upon the point) that defendant has crossed and recrossed so many times and appropriated so much of the location claimed by plaintiff, in the distance of a few miles, either that the location of plaintiff for that distance is the best obtainable, or that the defendant appropriated it for the purposes of obstruction.

28th. That the conduct of the defendant, in seizing upon and taking possession of the points in conflict herein immediately upon the dissolution of the injunction in this case, has rendered it impracticable for the plaintiff to proceed with the construction of its road in San Juan County, in the Territory of New Mexico pending this litigation, and that because of the length of the line of road contemplated by the plaintiff and its allied corporations, and the distance from any base of supplies, it is apparent that a considerable time must elapse before the actual possession of the points in controversy now occupied by defendant's road will be required by the plaintiff, in the construction, maintenance and operation of its said line of road; and that during such period and until the possession of the same shall be required by the plaintiff company for the construction of its own line, it is unnecessary to compel the defendant to re-

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move its line, or interfere with the operation of its road over such points, subject to the prior right of plaintiff to construct its own road thereon; but that the said plaintiff by virtue of its prior survey, location and adoption of its said line and its compliance with the laws of the Territory of New Mexico, has acquired and is entitled to the better and prior right to construct, maintain and operate its own road upon the said line so located and adopted by it throughout its entire length, including the portions thereof now occupied by defendant, and is entitled to the possession thereof for said purposes whenever, prior to a forfeiture of such rights, it shall proceed to complete construction of its said road over the same.

149 And thereupon, on the fact found as aforesaid, the Court doth make the following:

Conclusions of Law.

1. That at the time of the institution of this suit, the plaintiff had a prior and ever since has had and now has the prior and better right to construct, maintain and operate its line of road over and along the line so surveyed, located and adopted by it, and in the complaint described, and set forth in the maps and profiles heretofore filed by it in the office of the Secretary of the Territory of New Mexico; which right was and is a vested right in the plaintiff, subject only to such forfeiture as may hereafter be declared agreeably to the laws of the Territory of New Mexico; and which right was and is prior and superior to any right or claim of right of the defendant therein or thereto.

2. That plaintiff is entitled to the relief prayed in and by the complaint, and to a restoration of the conditions as they existed at the time of the institution of his action.

3. That in view of the actual construction and operation of defendant's line, and the public convenience, the right of the plaintiff to take possession of the said premises in controversy should be postponed until such time as it may desire to exercise such right by proceeding to complete the construction of its said line of railroad.

4. That the acts and doings of the defendant in entering upon and seizing the places and points in conflict along the said right-of-way of plaintiff, were wrongful, unauthorized, and without justification in law.

5. That plaintiff is under, and according to these findings
150 of fact and conclusions of law, entitled to a decree herein in conformity herewith, and for its costs herein to be taxed.

IRA A. ABBOTT,

Judge, etc.

Dec. 20, 1907.

Endorsed: Filed in my office this Dec. 20, 1907, John Venable, Clerk.

And thereafter, on to-wit, the 20th day of December, 1907, there was filed in the office of the Clerk of said Court in said Cause, the

Findings of Fact and Conclusions of Law, asked by Defendant's Counsel, which said Findings, etc., were in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO:

In the District Court, Bernalillo County.

THE ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO, a
Corporation, Plaintiff,

vs.

THE DENVER & RIO GRANDE RAILROAD COMPANY, a Corporation.
Defendant.

Defendant's Request for Findings of Fact and Conclusions of Law.

Comes now the defendant in the above entitled cause, by its attorneys, and respectfully prays the Court to make and enter of record therein the following findings of fact and conclusions of law:

151 This cause coming on to be heard on the bill, answer and replication, the parties being represented by their respective counsel, and having considered all the evidence offered by the parties respectively, and having heard the arguments of counsel of the respective parties, and being fully advised in the premises, the Court doth make and enter herein the following findings of fact and conclusions of law, to-wit:

Finding of Fact Number One.

That on or about the 7th day of July, 1904, one J. W. Reagan, and thereafter certain other persons, beginning at the town of Durango, in the County of La Plata and State of Colorado, entered upon and thereafter and until the 17th day of October, 1904, prosecuted the survey of a line of location for a railroad from said town of Durango in a southerly direction down the valley of the Animas River to the town of Farmington in the County of San Juan and Territory of New Mexico.

Finding of Fact No. Two.

That the plaintiff company completed its organization as a corporation under and by virtue of the laws of said Territory, on to-wit, the 15th day of October, 1904.

Finding of Fact No. Three.

That at the taking of testimony herein the plaintiff offered in evidence, over the objection of the defendant, certain alleged minutes of a certain alleged meeting of the Board of Directors of the plaintiff company purporting to have been held on the 24th day of October, 1904, said minutes purporting to show the adoption of a certain line

of railroad from engineer's station 1149 plus 35.0 to engineer's station 1953 plus 25.0, a distance of 15.225 miles, being from 152 a point on the boundary line between the State of Colorado and the Territory of New Mexico, to a point near the town of Aztec, in the County of San Juan, and Territory of New Mexico; and also certain other alleged minutes of a certain other alleged meeting of the Board of Directors of the said company, purporting to have been held on the 3rd day of December, 1904, said minutes purporting to show the adoption by said Board of a certain other line of survey from engineer's station 1916 plus 63.0, a point on the Las Animas River near the town of Aztec, to engineer's station 2817 minus 05.4, a point near the mouth of the Gallegos Canon, a distance of 17.053 miles. The plaintiff has not attempted to show a resolution of its Board of Directors adopting an Animas Valley Survey or location from Durango to the Colorado State line, or from the vicinity of Aztec to the town of Farmington.

Finding of Fact No. Four.

That the lines and surveys purporting to have been adopted by the Board of Directors of the plaintiff company on October 24 and December 3, 1904, appear from the testimony of Sroufe, McFarland, Reagan and Milton to be the lines surveyed and located by the last named persons, or some of them, prior to the incorporation of the plaintiff company, and therefore not surveyed or located by or by authority or direction of the plaintiff company.

Finding of Fact No. Five.

That it does not appear from any evidence introduced or offered by the plaintiff that the Board of Directors of the plaintiff company have adopted or attempted to adopt the line of road claimed by it between the town of Durango and the Colorado-New Mexico boundary line, and between the town of Aztec and the town of Farmington.

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Finding of Fact No. Six.

That in pursuance of its alleged purpose to locate a line of road for a railroad via the Animas Valley route between the town of Durango and the said town of Farmington, the plaintiff secured the execution and delivery to it of certain option contracts by one Walling, one Sutherland, one Hendrickson and one Quinn, bearing dates of April 26, 1905, May 8, 1905, April 25, 1905, and March 18, 1905, respectively, and acknowledged on the same dates respectively, except the Quinn option, which was acknowledged on March 23rd, 1905, and all recorded on June 6th, 1905; and also secured the execution and delivery to it of two certain deeds by one Young and one Miller, dated respectively May 8, 1905, and June 5, 1905, and recorded May 12, 1905, at 4:30 p. m., and June 7, 1905, respectively, the recording of both of said deeds being subsequent to the institution of this suit; and the Court further finds that under date of Feb-

ruary 6, 1905, the plaintiff caused to be prepared a certain notice to the effect that it had secured an option good to February 1st, 1906, for right-of-way across the lands of one Miller, one Knight, one Bousman, and one McCarthy, and reciting that said options were in a designated depository, which notice was not acknowledged but was recorded on February 6, 1905, and also certain other notice to the same effect bearing date of February 17, 1905, not acknowledged, recorded on February 20, 1905, and relating to an alleged right-of-way across the land of W. W. McEwen; also another similar notice, bearing no date, not acknowledged, but recorded on April 13, 1905, and relating to alleged right-of-way across the lands of one Quinn; and also another similar notice bearing date of April 26, 1905, not acknowledged but recorded on May 1st, 1905, and relating to alleged right-of-way across the lands of one Hendrickson and one Walling; also another similar notice, not dated and not acknowledged, 151 but recorded on May 4, 1905, and relating to alleged right-of-way across the lands of one Young; also another similar notice, dated May 8th, 1905, not acknowledged, but recorded on May 10th, 1905, and relating to alleged right-of-way across the lands of one Sutherland.

Finding of Fact Number Seven.

That the plaintiff has never acquired title to any right-of-way except across the Young and Miller tracts, deeds for neither of which parcels of right-of-way were recorded until after the institution of this suit; and that the plaintiff never even secured options for the right-of-way across the Whitney and McEwen tracts and never paid to exceed the sum of \$925.00 as consideration for all deeds and options for right-of-way at any time secured by it; that all of said options have expired by their own limitations; that the plaintiff has never graded or constructed any track anywhere in New Mexico, Colorado or Arizona, or elsewhere; that more than two years have elapsed since the survey and alleged location of the line claimed by it between Durango and Farmington, and since the date of its incorporation.

Finding of Fact Number Eight.

That the plaintiff's allegations relating to its desire, purpose and intent to construct a line of railroad from Durango to Farmington, are all denied by the defendant and that the plaintiff has failed to introduce or offer any evidence whatever of a desire, purpose or intent to do more than it had already accomplished in the year 1904, or to follow its surveys within a reasonable time or at any time with the actual grading, tying and tracklaying of a railroad track.

Finding of Fact Number Nine.

That the plaintiff has neither introduced nor offered any 155 evidence showing or tending to show that it has suffered irreparable or any injury, or that it will suffer irreparable or any injury by reason or in consequence of the acts of the defendant, or

that it can suffer any injury, delay or hindrance prior to such time as, if at all, it and the Arizona & Colorado Railroad Company of Arizona shall construct its and their alleged proposed line of railroad from a point in Arizona a distance of nearly 450 miles to a point easterly of the town of Farmington and that then all and singular such injury as may be occasioned to it by the acts, if any, of the defendant company, can and may be compensated in damages.

Finding of Fact Number Ten.

That a multiplicity of suits has not resulted to the plaintiff from the acts of the defendant, and that the acts of the defendant are not such as to hereafter involve the plaintiff in a multiplicity of suits, or any suits, in the event that the plaintiff should hereafter see fit to construct and complete a line of railroad from said Farmington to said Durango.

Finding of Fact Number Eleven.

That the plaintiff did not have record title or any title except in one instance (Young tract) at the time of the institution of this suit, prior to which time (May 12, 1905) and prior to the acquisition by the plaintiff of which title the defendant had instituted a condemnation suit to secure right-of-way for itself across said Young tract, which said suit was pending and undisposed of at the time of the acquisition of said title by said plaintiff.

Finding of Fact Number Twelve.

That the plaintiff was not in possession of the lands and premises involved in and the subject matter of this suit at the time of the institution thereof or at any time prior or subsequent thereto, 156 and had not secured a right of possession thereto or to any thereof at said time or subsequent thereto either by virtue of any contracts entered into or deeds secured by it or by virtue of its incorporation or any compliance with the laws of the Territory of New Mexico.

Finding of Fact Number Thirteen.

That on the — day of December, 1904, and prior to the survey and location of the defendant's line, the plaintiff surveyed, located, adopted, platted and filed in the United States Land Office its map of definite location alleged to have been adopted by its board of directors on December 3, 1904, of a line of railroad from a point in the Animas Valley on the easterly side of the defendant's line as surveyed and now constructed and on the northerly and easterly side of the alleged intersection of the line now claimed by the plaintiff with the defendant's constructed line on the Bouseman tract and extending thence along the easterly side of the Animas River to the San Juan River above the town of Farmington and past the said town of

Farmington at a distance of a mile and a half therefrom on the northeasterly side thereof and thence up the San Juan River to the mouth of the Gallegos Canon, with which said line defendant's line in no manner conflicts, which said Bouseman-Gallegos Canon Line was approved by the Honorable Secretary of the Interior on to-wit, the 5th day of May, 1905, and which said map filed and approved as aforesaid was notice to the defendant of plaintiff's proposed appropriation, and intended use of said line, rather than the line now claimed by the plaintiff between said Bouseman tract and the town of Farmington, and which said line involved no conflict with the defendant's line as now constructed across the lands of Bouseman, Sutherland, McCarthy, Walling Kight or Miller, and that said plaintiff's map of definite location filed in the United States Land

Office as aforesaid was widely different from and occupied a
 157 different position from the line now claimed by the plaintiff for a distance of about eight miles, partly above and partly below the town of Aztec.

Finding of Fact Number Fourteen.

That the plaintiff's alleged map of definite location of a line from the Colorado-New Mexico boundary down the Animas Valley to the town of Farmington and not shown to have been adopted by its Board of Directors between the town of Aztec and the town of Farmington, was not filed, either in the office of the Probate Clerk and ex-Officio Recorder of San Juan County, New Mexico, or of the Secretary of said Territory, until after the institution of this suit.

Finding of Fact Number Fifteen.

That the alleged objective point of the plaintiff's alleged proposed line of railroad is the coal fields in the vicinity of Durango; that said coal fields appear from the evidence to be situated southwesterly of said Durango on what is known as the Porter property and adjacent to the La Plata River in the vicinity of the point where said river crosses the Colorado-New Mexico boundary line and are accessible from the town of Durango by any practicable route which the plaintiff could secure only by a line of railroad from fifteen to thirty or more miles in length.

Finding of Fact Number Sixteen.

That the plaintiff has surveyed and definitely located and adopted a line from the point on the boundary line between Colorado and New Mexico down the La Plata Valley, a distance of 26.353 miles to a point on the San Juan River east of the town of Farmington and from two points in said La Plata Valley near said line between said

State and Territory, to coal lands in that vicinity and that it
 158 is apparent that said La Plata line would offer the short line from said coal fields to a connection with the line surveyed and definitely located by the plaintiff from the San Juan River up

the Chaca River and on to Clifton, Arizona, and a connection with the alleged contemplated lines of the Arizona & Colorado Railroad Company of Arizona.

Finding of Fact Number Seventeen.

That the plaintiff company claims to have definitely located lines southerly from the San Juan River and in and along the Gallegos and Chaca gateways, being the only available gateways southerly from the San Juan River and through the high and precipitous cliffs forming the southerly wall of the San Juan Valley.

Finding of Fact Number Eighteen.

That the valley of the Animas River from Durango to Farmington is for a considerable distance rather closely confined by precipitous walls, but increasing in width to about a mile or more near Farmington, but still confined within high, steep bluffs, through which the Animas River flows in a meandering course, passing alternately in its courses from wall to wall of said valley as it is successively deflected by each wall to the opposite side of the valley, as is usual in a stream of that character, and while the valley itself is comparatively level, with but gentle slopes from walls to stream at very many points the valley formation is entirely upon one side of the stream and while the formation of the valley is favorable to the construction of several lines of railroad, if each proceeds with due and proper respect for the rights and necessities of the others, the construction of one line regardless of the requirements of another, or others, will render the construction of another line without interference or intersection economically and practically impossible.

The grades of any number of lines starting at Durango and
159 terminating at Farmington unless involved in adverses must necessarily be practically identical and the less curvature involved in the construction of any number of lines the less conflict or interference between them will result. Any line from Durango and Farmington must necessarily cross the Animas River at least five times in order to overcome sharp river bends and to avoid steep bluffs and impracticable ground.

Finding of Fact Number Nineteen.

The plaintiff's line as now claimed between the Colorado State line and Farmington is located without respect or reference to the location or construction of any other line and from an economic and practical standpoint, either precludes the construction of another line or compels such an alignment as must necessarily involve several intersections or interferences, or both, with it. The defendant's constructed line begins and ends on the easterly side of the plaintiff's survey as now claimed. Located as the plaintiff's line is, and from an economic and practical standpoint, it was impracticable and impossible for the defendant to locate, construct, maintain or operate its line on the easterly side of plaintiff's claimed line

throughout its entire course, or to avoid several crossings of the plaintiff's survey.

Finding of Fact Number Twenty.

The defendant company was incorporated in the year 1886 and its original articles of incorporation specifically described a line from the town of Durango down the narrow valley of the Animas River to its junction with the San Juan River at the town of Farmington.

Finding of Fact Number Twenty-One.

160 The defendant company made reconnaissances of the Animas River between Durango and Farmington in the year 1896, and again in 1901, and it entered actively upon the acquisition of right-of-way for such line in December, 1904, and upon the actual construction of such line in February, 1905. As it proceeded southward and from the Whitney tract on to Farmington, it came in conflict with other surveys which it could not avoid without meeting prohibitive conditions. It found no titles in any other railroad company, no contracts or conveyances of record conferring any rights upon any other company; no other company in possession of any other right-of-way or vested with right of possession authorizing such company to proceed with the actual construction of a railroad and the plaintiff only vested with right and authority to enter with its engineers upon private lands to locate a line or to acquire right-of-way of occupancy by contract, purchase or condemnation, only the first of which rights had been exercised by the plaintiff in so far as the same appeared by competent record evidence.

Finding of Fact Number Twenty-Two.

The defendant proceeded to locate its line in such manner as would not interfere with the construction by the plaintiff of a line superior in grade and curvature to the one which the plaintiff now claims, and involving no intersections of the two lines, involving no increase in cost of construction, maintenance and operation of the plaintiff's line nor any impediment or hindrance to its due performance of its duties to the public as a common carrier, if it should ever see fit to construct a railroad; and also proceeded to secure necessary right-of-way therefor by purchase or condemnation and to construct and build its line all prior to December 22nd, 1905, and at an expense and cost of about \$830,000, and to put the same in operation as a common carrier of freight, passengers and the United States mails and to operate the same from that time to the present time.

161 Finding of Fact No. Twenty-Three.

The defendant did not proceed arbitrarily in the premises, or without regard to the reasonable rights of the plaintiff, or in a manner calculated to or which has prevented the plaintiff from the further

successful prosecution of its alleged enterprise whenever it may desire to do so, but did proceed to locate and construct a line of railroad in such manner and with such reference to existing topographical conditions as those conditions demanded; but without depriving plaintiff company of the opportunity to locate and construct a line of railroad, with no increase of its proposed maximum grade, free from numerous existing adverse grades, with less curvature and susceptible of construction, maintenance and operation without increase of cost or expense therefor, or incident thereto, except the insignificant expense of a resurvey of a portion of the plaintiff's claimed line, not to exceed some 25 miles in length and at an expense of not to exceed \$45.00 per mile.

Finding of Fact No. Twenty-Four.

The relative conditions involved in the surveys of the two companies, and the effect upon each company of changes of alignment obviating intersections of them is fairly illustrated by conditions existing between a point some two miles above the Whitney place and the point or curve in plaintiff's line a short distance below the McEwen intersection on the McEwen place. At such northerly point the plaintiff's line lies a short distance westerly of the defendant's line and passes thence by two or more curves to the point of bluff on the Whitney place where the first intersection of the two lines occurs, and thence southerly and easterly, and thence by more curvature and an adverse grade to the second designated intersection on the McEwen place and to the point of curve close to the
162 river bank, also on the McEwen place. The evidence of the plaintiff is that in locating its line it sought to secure the best available line, but Mr. Sroufe, its chief assistant engineer and principally in control of the plaintiff's operations in this locality, frankly testifies that he would be unable to say whether or not it would be possible to obtain another line located as advantageously with respect to gradients, curvature and economy of maintenance and operation as the plaintiff's claimed line between the point north of the Whitney crossing and Farmington, without any instrumental investigation and the running of such other lines on the ground from which to make comparison. Mr. Blouvelt and Mr. Porter, disinterested expert witnesses, called by the defense, and Mr. Gwyn, assistant chief engineer of the defendant company, testified that such other line could be run entirely on the westerly side of the defendant's constructed line between the points last above designated on favorable ground with considerable less curvature than that of the plaintiff's line and without the adverse grades now contemplated by plaintiff's located line and without involving an increase of cost of construction, maintenance or operation. This testimony is not contradicted and must be accepted as conclusive upon this branch of the case.

Finding of Fact No. Twenty-Five.

The practically uncontradicted evidence also shows that the construction of the defendant's line in such manner and in such a loca-

tion as to avoid intersection of or interference with the plaintiff's located line would involve economic and practical impossibilities; would result in increasing its curvature, the incorporation of adverse grades, the invasion and impairment of improved and highly cultivated fields and orchards; the encountering of practically insuperable obstacles in the form of bluffs and river; and diminished capacity to advantageously serve the public as a common carrier.

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Finding of Fact No. Twenty-six.

In May, 1905, prior to the bringing of this suit, the actual construction of the defendant company's road had progressed beyond what is known as the Whitney crossing, and a large force was then engaged in construction below Whitney and McEwen crossings, such construction having been begun in February or March, 1905. The Whitney crossing being located about one-quarter of a mile from the Las Animas River, the Whitney crossing being shown on the first map attached to the affidavits of M. E. Hendrickson, Charles E. McConnell and Charles C. Sroufe, on file in the case, as being located in Sec. 30, Township 32 N., R. 10 W., and the McEwen crossing or intersection being shown on the second map thereto attached, as being in S. E. $\frac{1}{4}$, Sec. 5, Township 31 N., R. 10 W.

Finding of Fact No. Twenty-seven.

The Court doth further find that the surveying parties, agents, employees and construction gangs were in possession of the whole of said line, actually engaged in construction of said road between stations 1350 and 2570, as shown upon profiles and maps of said plaintiff company in evidence in this cause, in the month of May, 1905, prior to the bringing of this suit, except the intersections of plaintiff's right-of-way as claimed by the plaintiff in this suit.

Finding of Fact No. Twenty-eight.

The defendant asks the Court to find that the only portion of the right-of-way claimed by the plaintiffs to which it had acquired complete title at the time suit was brought was the Edith M. B. Young tract, shown on the map attached to the affidavits in the said cause;

that is, title acquired either by deed or condemnation proceedings. Said land as shown by the maps filed attached to the affidavits of M. B. Hendrickson, Charles E. McConnell and Charles C. Sroufe, as being in the W. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ and S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of Sec. 13, T. 30 N., R. 11 W.

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Finding of Fact No. Twenty-nine.

Defendant asks the Court to find: That it has acquired by deed or conveyances and decrees of condemnation to the following pieces of land, upon that portion of its right-of-way involved in this dispute; that is to say between station 1350 and 2570, shown on the

map attached to the affidavits of M. B. Hendrickson, Chas. E. McConnell and Chas. C. Sroufe, filed in this cause and in evidence on the part of the plaintiff. The point of intersection in dispute in this case is between the rights-of-way of the two companies, being between the said two stations. The said several conveyances and condemnations referred to in this finding and the dates of the deeds and condemnation proceedings and the names of the persons from whom title was so acquired are as follows, to-wit:

Exhibits Introduced in Nock's Testimony.

No.	Grantor.	Record page
40—	Henry Ruh	661 (783)
41—	Hugh A. Shanks	663 (785)
42—	James L. Clark	666 (786)
43—	John Rohrer	667 (787)
44—	Edwin Mason Brown	669 (789)
45—	Richard Hancock	670 (790)
46—	Jose Ramirez	671 (793)
47—	Antonio D. Trujille	672 (794)
48—	Chas. J. Hurst	674 (795)
49—	Jane J. Oliver	676 (798)
165 50—	Mrs. Effie M. Bryce	677 (799)
51—	John A. Frazer	679 (801)
52—	Mrs. Robert Truby	681 (801)
53—	Jane Hale	683 (805)
54—	Douglas Doane	684 (805)
55—	A. E. Pieper	686 (809)
56—	Ira P. George, Perley A. George and Flora E. George	688 (811)
57—	C. P. Hanger	691 (813)
58—	F. B. Madison and wife	693 (815)
59—	Lock L. & L. Stk. Co.	694 (817)
60—	Tinker (Geo. A.) and Lula E. Tinker	697 (819)
61—	James M. Taylor and Matilda Taylor	698 (820)
62—	Louis Allinger	699 (822)
63—	Richard Hendricks	701 (823)
64—	W. W. McEwen	703 (827)
65—	Frank W. Blackner	706 (829)
66—	James F. Faulkner and Mary Faulk- ner	709 (832)
67—	Frank Harvey	710 (833)
68—	E. H. Foster	712 (835)
69—	G. Dolpra	713 (836)
70—	James T. Atterberry and Minnie At- terberry	715 (838)
71—	Lucy A. Hoyle	716 (839)
72—	E. D. Duncan and Fannie E. Duncan	718 (841)
73—	Joseph Perino and Mariano Perino..	719 (842)

Foot Note.—Figures in parentheses refer to pages of this printed record.

74—Leonard Boat	720	(843)
75—Henderson Rates	722	(845)
76—Charles E. Spath and Winnie Spath.	724	(847)
77—Granville Pendleton	725	(848)
78—M. F. Rhodes	727	(849)
79—T. L. Blake and Nina M. Blake.	728	(851)
166 80—Geo. W. McCoy and Ella A. McCoy	730	(853)
81—J. D. Thomas	732	(855)
82—Frederick W. Townsend and Kath- leen H. Townsend	734	(857)
83—W. H. Williams	736	(859)
84—Citizens of Aztec	738	(861)
85—Albert F. Ames and Charlotte E. Ames	741	(865)
86—William M. McGee and wife.....	744	(867)
87—Herman N. Rathjen (unmarried)...	746	(859)
88—Geo. Von Bockern and Sarah J. Von Bockern	747	(870)
89—Alice L., Clarence M. and Ernest Pepin	749	(872)
90—Chas. M. Tomkinson and Orlena Tom- kinson	750	(873)
91—R. J. Chambers and May Chambers, et al.	753	(876)
92—Evans Wood and Blanch D. Wood...	754	(877)
93—Urban S. Chambers	756	(879)
94—R. B. Sanderson	757	(880)
95—Almirtha J. Blancett and Chas. Mc- Coy	759	(882)
96—Samuel S. Heilman	760	(884)
97—Arthur Sever, Jno. Sever and Alice L. Sever	762	(885)
98—George A. Black	764	(887)
99—Peter Peaupre	765	(888)
100—Alice A. Comfort and Orlando B. ...	767	(890)
101—Thomas R. Bousman and Lucy N. Bousman	768	(892)
102—Sinclair W. Wightman.....	770	(894)
103—W. N. Kight	772	(895)
104—Citizens of Farmington and vicin- ity	773	(897)
167 105—Larkin Beck and wife.....	775	(898)
106—John W. Brown.....	776	(899)
107—E. A. Depew and wife.....	778	(901)
108—S. R. Blake	779	(902)
109—S. R. Blake.....	781	(905)
110—R. E. Cooper and E. M. Cooper.....	782	(906)
111—Mary Markley	784	(908)

112—James A. Duff, Jane K. Wilkins and her husband, J. R. Wilkins, Maude E. N. Willis and H. O. Willis, her husband	786	(910)
113—William C. Prewitt and Mattie A. Prewitt	789	(913)
114—W. C. Prewitt and Mattie A. Prewitt	791	(917)
115, 116, 117—Three letters Com. of Indian Affairs	797-799	(922)
(Exhibit 118 does not appear.)		
119, 120, 121, 122, 123—Certified copies of decrees, Dist. Court, First District ..	807	(932)
1st, vs. Frank M. Quinn and Linda A. Quinn	802	(932)
2nd, (Ex. 122) vs. Allison F. Miller and Julia A. Miller	810	(935)
124—Copy of decree vs. Louis Zollinger ..	812	(936)
125—(Does not appear) see p.	814	(937)
126—Vs. Giovanni Casazza	814	(938)
127—Order of town of Farmington vacating certain streets	815	(939)
128—Ordinance 136 of town of Farmington granting right-of-way to streets ..	816	(940)
129—Deed from Durango L. & C. Co.	817	(941)
130—Rees McCloskey	818	(942)
168 131—Frances F. Grubb	818	(943)
132—Grace C. Keegan (receipt) ...	818	(943)
133—Henry Ruh	819	(944)
134—John Rohrer	819	(944)
135—Hugh A. Shanks	820	(945)
136—James L. Clark	820	(945)
137—Christian Behrens	820	(945)
138—Edwin Mason Brown	821	(946)
139—Richard Hancock	821	(946)
140—Jose Lamirez	822	(947)
141—Antonio Trujillo	822	(947)
142—Charles J. Hurst	822	(948)
143—Jas. J. Oliver	823	(948)
144—Wm. J. Trumble	824	(949)
145—Effie M. Bryce	824	(950)
146—Chas. J. Hust	825	(950)
147—Elento Atencio	825	(951)
148—John A. Frazier	826	(951)
149—Edward Clement	826	(952)
150—Elizabeth Truby	827	(952)
151—Jane Hale	827	(953)
152—John Truby	828	(954)
153—Geo. J. Jorgens	829	(954)
154—Douglas Doane	829	(955)
155—Douglas Doane	830	(956)

156—Cassius M. Elliott and Lutrade J. Elliott	831	(956)
157—Mrs. A. E. Pieper and Wm. Pieper...	831	(957)
158—Chas. P. Hanger and Harriet N. Hanger	832	(958)
159—Ira P. George and Flora M. George...	832	(958)
160—Edward B. and Kate Hendricks.....	833	(959)
161—Fred B. and Tressie M. Madison.....	834	(960)
162—Lake Land & Livestock Co.....	835	(961)
163—Ella Selak	836	(962)
163 164—Dick and Clifford M. Oxford..	836	(962)
165—Ella and John Selak.....	837	(963)
166—Wm. H. and Belle E. Whitney.....	837	(964)
167—Geo. A. Tinker and wife.....	840	(966)
168—Jas. A. Taylor.....	840	(967)
169—Lewis Allinger	841	
169—(Duplicate identification Nos. should be 170)		(968)
171—Richard Hendricks and wife.....	842	(969)
172—W. W. McEwen.....	843	(939)
173—W. W. McEwen.....	844	(970)
174—Frank W. Blackner.....	844	(971)
175—Jas. M. Faulkner.....	845	(972)
176—Frank and Mary Harvey.....	845	(972)
177—Edward H. and Roxie E. Foster.....	846	(973)
178—W. C. Becker and Clara A. Becker...	847	(974)
179—Girole and Matilda Dalpra.....	847	(974)
180—Jas. P. and Minnie P. Atterberry...	848	(975)
181—Lucy A. White (widow)	848	(976)
182—E. D. and Fannie E. Duncan.....	849	(976)
183—Joseph and Marianna Perino.....	149-50	(977)
184—Leonard Boat	850	(978)
185—Henderson and Margaret E. Bates...	151	(978)
186—Chas. E. and Winnie Spath.....	151	(979)
187—Granville Pendleton	852	(979)
188—Mary Frances Knowlton.....	853	(981)
189—Wm. F. and Julia Roberts.....	853	(981)
190—Marvin F. Rhodes.....	854	(982)
191—Thos. L. and Nina M. Blake.....	855	(982)
192—Frank J. and Mary E. Pitt.....	855	(983)
193—Decree of Dist. Court, involving lands of Thos. McGee and wife.....	856	(984)
194—Herman F. and Hattie Lange.....	857	(985)
170 195—Wm. M. and M. Lou McGee...	857	(985)
196—Grayson C. and Caroline Hampton	858	(986)
197—Mary A. Shepherd.....	858	(987)
198—Geo. W. and Ella A. McCoy.....	859	(987)
199—J. G. and Rosa Thomas.....	860	(988)
200—Vacation to Thomas and wife, Ad. to the town of Aztec and the streets and alleys therein.....	860	(989)

201—Sherman S. and Lizzie N. Howe.....	861	(989)
202—Frederick W. and Katherine H. Town- send	861	(990)
203—Edwin G. and Alice W. Condit.....	862	(991)
204—W. H. and Annie Williams.....	863	(992)
205—Wm. H. and Annie Williams.....	863	(992)
206—Wm. H. and Annie Williams.....	864	(993)
207—School Dist. No. 2.....	864	(994)
208—Charlotte E. and Albert F. Amis....	865	(994)
209—Granville and Nancy Pendleton.....	865	(995)
210—Decree of Dist. Court, Luther Wolf et al.	866	(996)
211—Wm. and Lou McGee.....	867	(997)
212—Herman N. Rathjen.....	869	(998)
213—Chas. and Emma W. Ireland.....	869	(999)
214—John A. Kello.....	870	(999)
215—Matilda M. Blancett (widow), Geo. L. Blancett, Jas. A. McWilliams and Lillie M. McWilliams.....	871	(1000)
216—Marcellus Blancett	871	(1001)
217—Colorado and North-W. Invest. Co....	872	(1001)
219—L. W. and Louise Steinbach.....	873	(1003)
218—Geo. and Sarah J. Von Bockern	872	(1002)
171 220—Alice L. Pepin, Guardian of Clarence, Ernest, Daisy, Robert, Herbert and Willie Pepin.....	874	(1004)
220—A copy of order of Dist. Court approv- ing report of Alice Pepin as such guardian	874	(1004)
221—F. T. and Lillie L. Hickinan.....	875	(1005)
222—Robert J. and Mary Chambers.....	875	(1005)
223—Chas. M. and Orlena Tomkinson....	876	(1006)
224—Evans and Blanche Wood.....	876	(1007)
225—Urban S. and Carrie E. Chambers....	877	(1007)
226—Martha A. and Sylva Grouch.....	877	(1008)
227—Sadie Grouch	878	(1008)
228—Sam'l S. and Vina C. Heilman.....	878	(1009)
229—Almirtha J. Blancett	878	(1010)
230—Roy B. and Bessie Sanderson.....	880	(1010)
231—Arthur and Alice L. Sever, his wife and John Sever	880	(1011)
232—Geo. A. Black	881	(1012)
233—Clinton M. and Mary A. Hubbard....	881	(1012)
234—Decree of condemnation vs. Frank and Linda A. Quinn.....	883	(1014)
235—Peter Beaupre	883	(1014)
236—Alice A. and Orlando D. Comfort....	884	(1015)
237—Marion B. Hendrickson.....	884	(1016)
238—Decree of condemnation affecting lands embraced in Exhibit No. 126.	886	(1017)
239—Decree affecting land embraced in Ex. 125	886	(1018)

240—Thos. R. and Lucy N. Bousman	887	(1018)
172 241—Decree of Dist. Court, affecting certain lands	887	(1019)
242—Jas. E. and Nellie A. McCarty	888	(1020)
243—Wm. and Mary F. McRae	889	(1020)
244—Douglas Doane (single)	889	(1021)
245—Decree of Dist. Court vs. Wagner and Elizabeth Walking	890	(1022)
246—Disclaimer by the Ariz. & Col. R. R. Co.	891	(1022)
247—Sinclair W. and Jennie E. Wightman	891	(1023)
248—Jno. W. Brown	892	(1024)
249—Larkin and Mary Beck	892	(1024)
250—Benjamin and Adellie Ricketts	893	(1025)
251—Enos A. Depew and wife	893	(1026)
252—Adelbert C. and Nettie Hubbard	894	(1026)
253—(Same as No. 252)	895	(1027)
254—Durango Planing Co.	895	(1027)
255—Louis H. and Mabel Willer	896	(1028)
256—Sylvester R. Blake	896	(1029)
257—Ela and Milton Kavanaugh	897	(1029)
258—Amosa B. and Mabel F. McGaffey	897	(1030)
259—R. E. and E. M. Cooper and S. R. Blake	898	(1031)
260—Richrad T. F. Simpson	899	(1031)
261—E. K. and Geneva Hill	899	(1032)
262—Wm. and Nettie C. Locke	900	(1032)
263—Oliver J. Elmer	900	(1033)
264—Maud E. N. Willis, Herbert O. Willis, Lillian N. Markley, Jane K. Wil- kins, J. R. Wilkins, Mary J. Mark- ley, et al.	901	(1034)
173 265—Mary J. Markley	901	(1034)
Motion to strike out all of defend- ant's exhibits from Nos. 156-265 inclusive, also Nos. 166, 172, 234, 237, 240, 242	902	(1035)
Testimony with reference to ex. 48		
Pltfs. offer said ex. 48	940	(1075)
Ex. 48 again referred to, the same being letter gen. ofs.	940	(1075)
266—Affidavit of W. H. Whitney	949-950	(1086)

Conclusions of Law.

The Court doth further find the following conclusions of law num-
bered from 1 to —:

Conclusion of Law Number One.

That as to the Bouseman intersection and all other intersections
and interferences between the Bouseman intersection and the town

of Farmington, the plaintiff never acquired and does not possess any priority over the defendant, for amongst others, two sufficient reasons, namely: First: Because it does not appear that the plaintiff ever adopted this portion of its alleged located line; and second, because it appears that the plaintiff did definitely locate and adopt another and different line not involving any interferences or intersections either at or below said Bouseman's place.

Conclusion of Law Number Two.

That the plaintiff never acquired and does not possess any priority over the defendant as to any of the alleged points of conflict
174 or interference, for amongst others, two sufficient reasons; namely: Because the line now claimed by the plaintiff was not surveyed by the plaintiff or within the period of its corporate existence; such claim being predicated upon surveys and locations made by certain persons prior to its corporate organization; and second, because there is no sufficient evidence of the adoption of said line by its Board of Directors.

Conclusion of Law Number Three.

That conceding for the sake of argument that the plaintiff by its acts acquired a priority over the defendant, it has lost such priority by its laches in failing to follow up its advantage with reasonable and due diligence by the acquisition of right-of-way and the actual construction or the beginning of construction of a railroad track including grading, tying and railing or one of them or any part of its claimed line, and that it would be contrary to public policy and the conservation of public convenience, interest and benefit to permit the plaintiff to claim and hold a priority as to any designated line of route against a rival company which has been diligent in the construction of its line of railroad and had long since provided the public with transportation facilities and especially in the absence of any evidence on the part of the plaintiff that it desired or intended to construct a road over the line located by it or any other line.

Conclusions of Law Number Four.

That under the evidence submitted the alleged notice of certain alleged option contracts did not constitute notice to the defendant, and that such options having expired and the plaintiff having failed to secure record title to any of the lands in controversy prior to the
175 institution of this suit, and having failed to secure or to attempt to secure title by condemnation, equity as well as the law should favor the defendant, whose greater diligence at great expense has provided the public with transportation facilities and has opened a wide and previously isolated section of the Territory to commerce and commercial intercourse with the world.

Conclusions of Law Number Five.

That under the Statutes of the Territory of New Mexico the filing of its articles of incorporation by the plaintiff gave it no right to enter upon the lands in controversy for any purpose other than to locate a line of railroad, and no right or authority to construct a line of railroad thereon, and that the survey and location of such line constituted no part of the construction of a railroad over lands, the title to which it did not possess and over which the plaintiff making such survey and location possessed no right or authority to construct a railroad, the construction of which would constitute a trespass upon such lands.

Conclusions of Law Number Six.

That the unrecorded options secured by the plaintiff gave it no right or authority to construct a railroad over and upon the lands described therein until such time as it should see fit within the time limited thereby to pay the purchase price therein designated, which it had not done at the time of the institution of this suit, except in one instance, involving the Young tract, the deed for which was not recorded until after the institution of this suit; so that neither by its incorporation nor by contract nor by condemnation had the plaintiff secured any right to construct a railroad over the lands in controversy prior to the institution of this suit.

Conclusions of Law Number Seven.

That the Statutes of the Territory of New Mexico do not
173 give to the plaintiff possession of the lands on which its line was located but only a right to enter upon the same for the purpose of surveying and locating a line and that in order to the preservation to the plaintiff of the rights given to it as a quasi public corporation it was in duty bound to proceed diligently in the exercise of such rights and to promptly acquire necessary right-of-way for its proposed railroad by purchase or condemnation, and that it was not and is not vested with the right or authority to burden the land over which its said line was located with a servitude of its own creation, which necessarily constituted a burden thereon and an impediment to the free disposition and transfer thereof, and that its laches in the premises divested it as to such lands of any right incident to its corporate existence as against its more diligent rival.

Conclusion of Law Number Eight.

That the plaintiff is not deprived by the acts of the defendant of ability to prosecute its enterprise, if it should so desire, to its legitimate conclusion, and has been deprived of no legal right, and has been and will be occasioned no irreparable injury or any injury which cannot be adequately compensated in damages, but for the fact that it disclaims an intent to seek damages, from the defendant for its alleged trespass and that in any event its only legitimate claim

for damages must be predicated upon the expense incident to a partial resurvey of its line from a point above the Whitney place to the town of Farmington.

Conclusions of Law Number Nine.

That under all the facts and circumstances disclosed to compel the defendant to remove its tracks from the lands in controversy or to abandon the same, or to surrender said premises to the plaintiff,

177 would constitute an unwarranted taking of property without due process of law, contrary to the inhibition of the constitution of the United States.

Conclusion of Law Number Ten.

That the plaintiff has not been compelled and will not be compelled to resort to a multiplicity of suits by the acts of the defendant and has not been or will not be compelled to resist such multiplicity of suits.

Conclusion of Law Number Eleven.

That the plaintiff had at the time of the institution of this suit and now has a plain, speedy and adequate remedy at law, for all loss, damage, injury and inconvenience, if any, occasioned or which may result from the acts of the defendant in the premises.

Conclusion of Law Number Twelve.

That the plaintiff had neither possession of nor right of possession to the premises in controversy at the time of the institution of this suit; that it did not hold a record title to any of the premises in controversy at the time of the institution of this suit or any title thereto, except in the one case of the Young tract, and that having neither possession, right of possession nor title to said lands, equity jurisdiction did not attach, and this Court had not and has not jurisdiction hereof.

Endorsed: Filed in my office this Dec. 20, 1907. John Venable, Clerk.

And thereafter, on to-wit, the 20th day of December, 1907, there was filed and entered of record in the office of the Clerk of said Court in said cause, a certain order of refusal of defendant's findings, which said order was in words and figures as follows, to-wit:

178 Territory of New Mexico, County of Bernalillo, in the District Court.

THE ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO
vs.
THE DENVER & RIO GRANDE RAILROAD COMPANY.

Order.

This cause coming on to be heard upon the request for findings made by the defendant, and the plaintiff, and the findings made by the Court, the Court having heard counsel for both parties,

It is ordered, adjudged and decreed that all the findings requested by the defendant, except findings Nos. 28 and 29, which are found, are hereby refused; and the Court being fully advised in the premises, doth enter final decree in said cause.

IRA A. ABBOTT, *Judge.*

Dec. 20, 1907.

Endorsed: Filed in my office this Dec. 20, 1907. John Venable, Clerk.

And thereafter, on to-wit, the 20th day of December, 1907, there was filed and entered of record in the office of the Clerk of said Court in said cause, a Final Decree, which said Decree was in words and figures as follows, to-wit:

179 In the District Court in and for the County of Bernalillo, in the Second Judicial District of the Territory of New Mexico.

No. 7121.

THE ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO,
Plaintiff,

vs.

THE DENVER & RIO GRANDE RAILROAD COMPANY, Defendant.

Decree.

This cause coming on to be heard upon the pleadings and the proofs taken herein, and upon the findings of fact and conclusions of law made and entered by the Court, and for final decree thereupon, counsel having been heard, and the Court being sufficiently advised in the premises,

It is considered ordered, adjudged and decreed, That the issues herein be and they are found with the plaintiff; and that the plaintiff is entitled to the relief prayed herein, subject only to the limitation or condition that it shall not be authorized to oust the defendant from the possession of that portion of the line in controversy now

occupied by defendant company in the actual operation of its line of railway until such time as plaintiff shall have constructed at least twenty miles of railroad, substantially complete for use, within the Territory of New Mexico along the line adopted by it as set forth and described in its complaint, and shall actually enter upon the grading of its adopted line of railroad between Farmington, 180 New Mexico, and Durango, Colorado, along said line: and provided that the plaintiff shall have complied with all conditions precedent to such construction, still to be performed by it in order to conform to the provisions of the law of New Mexico relating to the laying out and construction of railroads.

It is considered ordered, adjudged and decreed by the Court that the plaintiff, The Arizona & Colorado Railroad Company of New Mexico, do have and recover of and from the defendant, The Denver & Rio Grande Railroad Company, the possession of the said line and railroad right-of-way of the said plaintiff, by it adopted, surveyed and located, as described in the complaint herein, and as set forth in the maps and profiles filed in the office of the Secretary of the Territory of New Mexico, and in the office of the Probate Clerk and ex-Officio Recorder of the County of San Juan, in the Territory of New Mexico, and that the said defendant do vacate and surrender to plaintiff the possession thereof, when the said plaintiff shall have constructed at least twenty miles of railroad substantially complete for use, within the Territory of New Mexico along the line adopted by it as set forth and described in its complaint, and shall actually enter upon the grading of its line of railroad between Farmington, New Mexico, and Durango, Colorado, along the said line adopted by plaintiff and in the said complaint described and provided that the plaintiff shall have complied with all conditions precedent to such construction, still to be performed by it in order to conform to the provisions of the laws of New Mexico relating to the laying out and construction of railroads.

It is further considered ordered, adjudged and decreed, That the rights of plaintiff to enter upon said right-of-way, and to take, grade and possess the same as hereinabove decreed, and the duty of 181 defendant to vacate and surrender to plaintiff the possession thereof, shall be limited in time to the space and period ending five years from the date of this decree.

It is further considered ordered, adjudged and decreed, That the said defendant be and it is restrained and enjoined henceforth from prosecuting further any condemnation suits or actions now pending or which might be hereafter by defendant instituted, in so far as such suits or actions may in any wise affect the rights and interests of the plaintiff company in and to the said line so located and adopted by it, and hereinabove mentioned.

It is further considered ordered, adjudged and decreed, That the said defendant be and it hereby is restrained and enjoined henceforth from any further or other entry or trespass upon the said line of road so adopted and located by said plaintiff, and hereinabove mentioned except only in so far as it is by this decree expressly permitted to continue the operation of its road as now constructed until such time as in this decree above provided.

It is further considered ordered, adjudged and decreed, That the plaintiff do further have and recover of and from defendant its costs herein to be taxed.

IRA A. ABBOTT, *Judge.*

Dec. 20, 1907.

Endorsed: Filed in my office this Dec. 20, 1907, John Venable, Clerk.

And thereafter, on to-wit, the 25th day of January, 1908, there was filed in the office of the Clerk of said Court in said cause, a Motion to Fix Amount of Supersedeas Bond, and to grant an appeal, which said Motion was in words and figures as follows, to-wit:

182 Territory of New Mexico, County of Bernalillo, in the District Court.

No. 7121.

ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO,

vs.

DENVER & RIO GRANDE RAILROAD COMPANY.

Motion.

Now comes the defendant in the above entitled cause, the Denver & Rio Grande Railroad Company, and moves the Court to fix the amount of a supersedeas bond to be given in said cause, and to grant it an appeal to the Supreme Court of the Territory of New Mexico.

W. B. CHILDERS,

Attorney for Defendant.

H. B. Fergusson, Esq., At-orney for Plaintiff:

You are hereby notified that the defendant in the above entitled cause will call up the above motion for hearing before the Judge of said Court, at the Court House of Bernalillo County, on Thursday, the 30th day of January, 1908, at 10 o'clock a. m., or as soon there after as counsel can be heard.

Dated January 24th, 1908.

W. B. CHILDERS,

Attorney for Defendant.

Copy of Motion and Notice served on H. B. Fergusson Jan. 24, 1908.

Endorsed: Filed in my office this Jan. 25, 1908. John Venable, Clerk.

183 And thereafter, on to-wit, the 1st day of February, 1908, there was filed and entered of record in the office of the Clerk of said Court in said cause, an Order Granting Appeal and
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supersedeas, which said order and supersedeas bond were in words and figures as follows, to-wit:

Territory of New Mexico, County of Bernalillo, in the District Court.

No. 7121.

THE ARIZONA & COLORADO RAILROAD CO. OF NEW MEXICO
VS.

THE DENVER & RIO GRANDE RAILROAD CO.

Order Granting Appeal and Supersedeas.

This cause coming on to be heard upon the application of the defendant for an order granting it an appeal to the Supreme Court of New Mexico and for a supersedeas and praying that the amount of the bond of supersedeas be fixed.

It is ordered adjudged and decreed by the court that the said appeal be granted and that a supersedeas be allowed said defendant on its giving bond, with approved surety company or personal security, said bond to be approved by the Court, in the sum of Fifty Thousand (\$50,000) dollars.

Upon the giving of the said bond, the injunction heretofore granted by this Court, by virtue of its final decree, shall be suspended, pending said appeal, provided that the appellant prosecutes its said appeal with due diligence, to final decision within 184 two years from date of this Order, and fixes that time beyond which said supersedeas of the injunction shall not extend.

IRA A. ABBOTT, *Judge*.

February 1st. 1908.

Know all men by these presents That William B. Childers as Principal for and on behalf of the Denver & Rio Grande Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of Colorado and doing business in the Territory of New Mexico, and the United States Fidelity and Guarantee Company of Baltimore, Maryland, a corporation, as Surety, are held and firmly bound unto the Arizona & Colorado Railroad Company of New Mexico in the penal sum of Fifty Thousand (\$50,000) dollars, lawful money of the United States, to be paid to the above named obligee, its successors, or assigns, for the payment of which well and truly to be made, we bind ourselves, our heirs, administrators and executors, and our successors jointly and severally by these Presents. Sealed with our seals this, the 13th. day of February, A. D., (1908) One thousand nine hundred and eight.

Whereas, the said Arizona & Colorado Railroad Company of New Mexico, the said obligee, did, on the 20th day of December, A. D., 1907, in the District Court of the Second Judicial District, County of Bernalillo, Territory of New Mexico, obtain a decree against the

said Denver & Rio Grande Railroad Company, enjoining it as to certain portions of right-of-way in controversy between said companies, and for costs, all of which fully appear in said decree rendered in said cause, being case No. 7121 on the docket of the said District Court. And

Whereas, the said defendant railroad company in said suit has sued out an appeal to the Supreme Court of the Territory of New Mexico, and the said District Court has granted a Supersedeas, superseding said decree and judgment, provided the said appellant, or some one for it, gave a supersedeas bond in the sum of Fifty Thousand (\$50,000) dollars, as provided by statute.

The condition of the foregoing is such that, if the said Denver & Rio Grande Railroad Company shall prosecute said appeal with due diligence in the Supreme Court, and if the decision of the Court below be affirmed, or the appeal be dismissed, it will comply with the decree of the District Court and pay all damages and costs adjudged against it in the District and Supreme Courts on such appeal. Then this obligation shall become null and void; otherwise to remain in full force and effect.

In witness whereof, the said Principal has hereunto set his hand and seal, and the said United States Fidelity and Guarantee Company has caused this bond to be executed in its behalf by its duly authorized agent and by its duly authorized attorney and the seal of the said corporation attached to the said instrument this, the 13th, day of February, A. D., 1908.

(Signed) WILLIAM B. CHILDERS, [SEAL.]
Principal, for and on Behalf of the Denver
& Rio Grande Railroad Co.
UNITED STATES FIDELITY AND
GUARANTEE COMPANY,

(Signed) By O. N. MARRON, [SEAL.]
Its Attorney, and

(Signed) By P. F. McCANNA, [SEAL.]
Its Agent.

TERRITORY OF NEW MEXICO.

County of Bernalillo:

On this, the 13th, day of February, A. D., 1908, before me personally appeared P. F. McCanna and O. N. Marron, the said P. F.

McCanna to me known and to be the agent of the said company, and O. N. Marron, the Attorney of the said company, the corporation described in and who executed the within foregoing bond, and the said P. F. McCanna and O. N. Marron by me duly sworn, each did say: That the said P. F. McCanna is the agent of the United States Fidelity and Guarantee Company, and that O. N. Marron is the Attorney for the United States Fidelity and Guarantee Company, and each did say that the seal affixed to the within instrument is the corporate seal of the said corporation and was thereto affixed by order and authority of the Board of

Directors of the said corporation, and that the same is the free act and deed of the said corporation; and each certifies that the assets of said Company, unencumbered and liable to execution, exceed its claims, debts and liabilities of every nature by more than the sum of five hundred thousand (\$500,000) dollars; that the United States Fidelity and Guarantee Company has complied with all the laws of the Territory of New Mexico, relating to surety companies doing business in said Territory, and is duly licensed and legally authorized by such Territory to qualify as sole surety on the bond hereto annexed.

(Signed)

P. F. McCANNA.

(Signed)

O. N. MARRON.

Acknowledged, subscribed and sworn to before me this, the 13th day of February, A. D. 1908.

(Signed)

THOMAS K. D. MADDISON,

Notary Public.

TERRITORY OF NEW MEXICO,

County of Bernalillo:

On this, the 13th day of February, A. D., 1908, before me personally appeared William B. Childers, as Principal, for and on behalf of the Denver & Rio Grande Railroad Company, who, being duly sworn, on oath did say that he executed the foregoing bond as the free act and deed of said corporation.

187 In witness whereof, I have hereunto set my hand and affixed my official seal the day and year last above written.

(Signed)

THOS. K. D. MADDISON,

[SEAL.]

Notary Public.

The above and foregoing bond, as to form and sufficiency of surety, approved by Court this 15th day of February, A. D., 1908.

IRA A. ABBOTT, *Judge.*

This bond approved by me as to form and sufficiency of surety this 15th day of February, 1908.

JOHN VENABLE,

Clerk of Dist. Court.

Endorsed: Filed in my office this Feb. 15, 1908. John Venable, Clerk.

And thereafter, on to-wit, the 7th day of April, 1908, there was filed and entered of record in the office of the Clerk of said Court in said cause an Order Extending Time to Make Record, which said Order was in words and figures as follows, to-wit:

7121.

ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO
vs.
DENVER & RIO GRANDE RAILROAD COMPANY.

Upon reading and filing the stipulation signed by attorneys for the respective parties, it is ordered, in accordance therewith, that the time for defendant and appellant to file the record in this cause in the Supreme Court of the Territory and to serve printed copies thereof, be and the same hereby is extended until the first day of July, 1908.

IRA A. ABBOTT,
Associate Justice, etc.

Endorsed: Filed in my office this Apr. 7, 1908. John Venable,
Clerk.

And thereafter, on to-wit, the 9th day of April, 1908, there was filed and entered of record in the office of the Clerk of said Court in said cause, an Order Allowing Referee's fees and charges, which said order was in words and figures, as follows, to-wit:

In the District Court for the County of Bernalillo.

No. 7121.

THE ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO
vs.
THE DENVER & RIO GRANDE RAILROAD COMPANY.

This cause having come on to be heard this 9th day of April, 1908, upon the report of the referee herein for the allowance of his fees, and the taxation thereof, and it appearing that the charges certified by the referee in his own behalf are approved by the plaintiff, and not excepted to by the defendant in its exceptions taken to the report of the referee nor otherwise, and the Court being satisfied in the premises,

It is ordered, That the fees and charges of the referee in the sum of \$1,437.15, as itemized in his said report, be and the same are hereby allowed, and the clerk is hereby directed to tax the same as costs in this cause to be collected as other costs.

IRA A. ABBOTT, *Judge, etc.*

Endorsed: Filed in my office this Apr. 9, 1908. John Venable,
Clerk.

And afterwards, to-wit, on the first day of June, 1908, an order was made and entered of record in said cause, which order is as follows:

ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO
 VS.
 DENVER & RIO GRANDE RAILROAD COMPANY.

It appearing to the Court that it is impracticable for the defendant and appellant in this cause to procure or furnish reproductions for use as a part of the record on appeal, of plaintiff's exhibit No. 27, which is a map of the Territory of New Mexico issued by the United States General Land Office, and it being necessary and proper, in the opinion of the Judge of this Court, that said exhibit should be inspected in the Supreme Court of the Territory, upon said appeal, it is hereby ordered that said plaintiff's exhibit No. 27 be sent by the clerk of this Court to the clerk of the Supreme Court, together with the record on said appeal, and that upon the conclusion of said appeal in said Supreme Court, said exhibit be returned by the clerk of that Court to the clerk of this Court, unless said Supreme Court shall otherwise direct.

IRA A. ABBOTT,
Associate Justice, etc.

190 TERRITORY OF NEW MEXICO,
County of Bernalillo, ss:

I, the undersigned, clerk of the District Court of said County, hereby certify that the foregoing is a true copy of the record and of all proceedings in that certain cause lately pending in said Court, wherein the Arizona & Colorado Railroad Company of New Mexico was plaintiff, and the Denver & Rio Grande Railroad Company was defendant, as the same remain of record in my office, with the exception of plaintiff's exhibit No. 27, the original of which has been ordered by the District Court to be sent to the Supreme Court, and with the exception also of plaintiff's exhibits numbered 1, 2a to 2h, 3 to 8, 28 to 47, and defendant's exhibits numbered 1 to 5, 11 to 39, 269, 169a, 270, 270a and 271 to 274, all of which are maps or photographs, and are to be reproduced and certified separately from the present record, so as to form a part of the complete record of the case on appeal, it being impracticable, on account of the size and character of these exhibits, to include them with this part of the record.

In witness whereof I hereunto set my hand and the seal of said District Court, this eighth day of June, 1908.

[SEAL.]

JOHN VENABLE, *Clerk.*

191 And afterwards, on to-wit: on the tenth day of July, A. D. 1908, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, an assignment of errors in the above entitled cause, which said assignment of errors was and is in the following words and figures to-wit:

Assignment of Errors.

In the Supreme Court of the Territory of New Mexico.

ARIZONA AND COLORADO RAILROAD COMPANY OF NEW MEXICO

VS.

DENVER AND RIO GRANDE RAILROAD COMPANY, Appellant.

Now comes the said appellant and says that there is manifest error in the proceedings and judgment of the court below, whence this cause came into this court, and specifies the following as such error:

1. The court erred in making any reference of the cause against objection of defendant. (Pages 121-2, 141, 2417-8, 2425 to 2427, and 2429 of Record.)

2. The court erred in refusing to strike the report of the pretended referee from the files. (Pages 2424 to 2428, and 2429 of Record.)

3. The court erred in overruling defendant's objection to question asked of plaintiff's witness, Blair Burwell, as to examination with reference to crossings, intersections or conflicts between the lines of defendant and plaintiff. (Pages 142 and 2429 of Record.)

4. The court erred in overruling the objection of defendant to the question asked of witness Blair Burwell as to what physical reason, if any, there is to prevent the construction of a railroad entirely upon the east or southern side of the line surveyed by the Arizona and Colorado Railroad Company between the Whitney crossing and Farmington. (Pages 152 and 2430 of Record.)

5. The court erred in overruling defendant's objection to record of plaintiff's notice of option over land of Henry T. Henry and others. (Pages 177 and 2435 of Record.)

6. The court erred in denying defendant's motion to strike out foregoing record of notice of options. (Pages 179 and 2435 of Record.)

7. The court erred in overruling defendant's objection to record of notice of right of way options from R. B. Sanderson and others. (Pages 179-80 and 2435 of Record.)

8. The court erred in denying defendant's motion to strike out the last mentioned record of notice of objections. (Pages 181 and 2435 of Record.)

9. The court erred in overruling defendant's objection to the record of notice of option for right of way from Frank M. Quinn and others. (Pages 181-2 and 2435 of Record.)

10. The court erred in denying defendant's motion to strike out the last mentioned record of notice of options. (Pages 182 and 2436 of Record.)

11. The court erred in overruling defendant's objection to the record of notice of right of way options from Hendrickson and others. (Pages 182-3 and 2436 of Record.)

12. The court erred in denying defendant's motion to strike out

last mentioned record of notice of options. (Pages 183 and 2436 of Record.)

13. The court erred in overruling defendant's objection
194 to the record of notice of options from Edith M. Young.
(Pages 184 and 2436 of Record.)

14. The court erred in denying defendant's motion to strike out last mentioned record of notice of option. (Pages 184 and 2436 of record.)

15. The court erred in overruling the defendant's objection to the record of notice of right of way options from William Sutherland and others. (Pages 184-5 and 2436 of Record.)

16. The court erred in denying defendant's motion to strike out last mentioned record of notice of right of way option. (Pages 185 and 2436 of Record.)

17. The court erred in overruling defendant's objection to the record of notice of option from Arthur Sever and others. (Pages 185-6 and 2436 of Record.)

18. The court erred in denying defendant's motion to strike out last mentioned record of notice of option. (Pages 186 and 2437.)

19. The court erred in overruling defendant's objection to record of agreement between Walling and wife and plaintiff. (Pages 186-7 and 2437 of Record.)

20. The court erred in denying defendant's motion to strike out the record of said agreement. (Pages 188 and 2437 of Record.)

21. The court erred in overruling defendant's objection to the record of agreement between Sutherland and plaintiff. (Pages 189 and 2437 of Record.)

22. The court erred in denying defendant's motion to strike out said last mentioned record of agreement. (Pages 190 and 2437 of Record.)

23. The court erred in overruling defendant's objection to the record of agreement between Hendrickson and plaintiff.
195 (Pages 191 and 2438 of Record.)

24. The court erred in denying defendant's motion to strike out said last mentioned record of agreement. (Pages 193 and 2438 of Record.)

25. The court erred in overruling defendant's objection to the record of agreement between Quinn and wife and plaintiff. (Pages 193 and 2438 of Record.)

26. The court erred in denying defendant's motion to strike out the last mentioned record of agreement. (Pages 195 and 2438 of Record.)

27. The court erred in overruling defendant's objection to the record of deed from Edith M. Young. (Pages 196 and 2438 of Record.)

28. The court erred in denying defendant's motion to strike out the last mentioned record of a deed. (Pages 200 and 2438 of Record.)

29. The court erred in overruling defendant's objection to the record of deed from Miller and wife to plaintiff. (Pages 201 and 2439 of Record.)

30. The court erred in denying defendant's motion to strike out the record of last mentioned deed. (Pages 204 and 2439 of Record.)

31. The court erred in overruling defendant's objection to the question asking the witness Eblen as to his having examined the records of San Juan county in his office to ascertain what had been filed there by or for the defendant. (Pages 204 and 2439.)

32. The court erred in overruling defendant's objection to the question asked witness Eblen as to what papers from such examination he found filed by defendant. (Pages 204-5 and 2439 of Record.)

33. The court erred in overruling defendant's objection 196 to question asked the witness Eblen as to whether any other map, plat or profile had been filed in his office by defendant. (Pages 205 and 2439 of Record.)

34. The court erred in overruling defendant's objection to the question asked the witness Eblen as to whether any declaration by defendant to build a branch line or extension in San Juan county had ever been filed in his office. (Pages 205 and 2439 of Record.)

35. The court erred in overruling defendant's objection to the question asked the witness Eblen as to whether during the spring and summer of 1905 McCloskey was frequently in his office and examining the records. (Pages 205 and 2439 of Record.)

36. The court erred in overruling defendant's objection to the question asked the witness Eblen as to whether or not Mr. McCloskey had opportunity to examine and did examine deed record 14. (Pages 206-7 and 2440 of Record.)

37. The court erred in overruling defendant's objection to the record of the minutes of the meeting of January 11, 1905, of the trustees of the town of Farmington. (Pages 208 and 2440 of Record.)

38. The court erred in overruling defendant's objection to the question asked the witness Rodgers as to his having in his custody the original ordinance referred to in said minutes. (Pages 209 and 2440 of Record.)

39. The court erred in overruling defendant's further objection to the reading of the document offered as a record of the ordinance adopted January 11, 1905. (Pages 210 and 2440 of Record.)

40. The court erred in overruling defendant's objection 197 to the reading of the publisher's affidavit. (Pages 215 and 2441 of Record.)

41. The court erred in denying defendant's motion to strike said alleged ordinance from the record. (Pages 216 and 2441 of Record.)

42. The court erred in overruling defendant's objection to the question asked witness Rodgers to read from the minutes of the meeting of December 6, 1905, an ordinance or franchise granted to plaintiff. (Pages 217 and 2441 of Record.)

43. The court erred in denying defendant's motion to strike from the record the alleged record of the meeting of the trustees of the town of Farmington purporting to be held December 6, 1905. (Pages 217 and 2441 of Record.)

44. The court erred in overruling defendant's objection to the reading into the record of the instrument produced by the witness Rodgers. (Pages 218 and 2441 of Record.)

45. The court erred in overruling defendant's objection to the question asked the witness Rodgers as to his having the ordinance granting the franchise or right of way to plaintiff. (Pages 219 and 2442 of Record.)

46. The court erred in overruling defendant's objection to the reading into the record of the document produced by the witness Rodgers.

47. The court erred in denying defendant's motion to strike from the record the said alleged ordinance Number 135. (Pages 223 and 2442 of Record.)

48. The court erred in overruling defendant's objection to the reading in evidence of the affidavit of the publisher. (Pages 198 223-4 and 2442 of Record.)

49. The court erred in sustaining plaintiff's objection to the question asked the witness Rodgers as to what the body of the alleged ordinance No. 135 purports to contain. (Pages 226 and 2442 of Record.)

50. The court erred in denying defendant's motion to strike out the evidence of the witness Bouseman with reference to the compensation to be paid to him by plaintiff. (Pages 241 and 2443 of Record.)

51. The court erred in overruling defendant's objection to the question asked the witness McConnell as to the topographical conditions between the northern line of New Mexico and the town of Farmington with reference to the construction of a railroad line. (Pages 293 and 2445 of Record.)

52. The court erred in overruling defendant's objection to the question to witness McConnell as to date when an agreement with Miller was secured. (Pages 294 and 2446, of Record.)

53. The court erred in overruling defendant's objection to the reading into the record of the agreement between Bousman and plaintiff. (Pages 295-6 and 2446 of Record.)

54. The court erred in denying defendant's motion to strike out said last mentioned agreement. (Pages 297 and 2446 of Record.)

55. The court erred in overruling defendant's objection to the question asked the witness McConnell as to the making of an agreement with McCarty. (Pages 298 and 2446 of Record.)

56. The court erred in denying defendant's motion to strike from the record the alleged above contract of McCarty. (Pages 199 301 and 2446 of Record.)

57. The court erred in overruling defendant's objections to the questions asked the witness McConnell as to an agreement between Kight and the plaintiff. (Pages 301 and 2447 of Record.)

58. The court erred in denying defendant's motion to strike from the record the above contract of W. N. Kight. (Pages 303 and 2447 of Record.)

59. The court erred in denying defendant's motion to strike out

the answer of the witness McConnell which sets out various negotiations with Dr. McEwen. (Pages 305-6 and 2447.)

60. The court erred in overruling defendant's objection to question to the witness McConnell as to having negotiations with W. H. Whitney. (Pages 303 and 2448 of Record.)

61. The court erred in denying defendant's motion to strike out the answer of the witness McConnell as to the transactions with Whitney. (Pages 307 and 2448 of Record.)

62. The court erred in denying defendant's motion to strike out the answer of the witness McConnell as to what he did with regard to securing right of way. (Pages 308-9 and 2448 of Record.)

63. The court erred in overruling defendant's objection to the question to the witness McConnell as to what proportion of the owners of the lands between Durango and Farmington he was able to secure agreements from. (Pages 309 and 2448 of Record.)

64. The court erred in sustaining plaintiff's objections to questions to the witness McConnell relative to the Phelps-Dodge people. (Pages 335 and 2449 of Record.)

65. The court erred in sustaining plaintiff's objection to any and all interrogatories relating to the Phelps-Dodge people. (Pages 335 and 2449 of Record.)

66. The court erred in denying defendant's motion to strike out the answer of the witness Milton as to the possible location and construction of a railroad to the east and south side of plaintiff's location between the Whitney land and Farmington. (Pages 359 and 2450 of Record.)

67. The court erred in overruling defendant's objection to a question to the witness Milton relative to plaintiff's exhibits 2A to 2H. (Pages 359-60 and 2450 of Record.)

68. The court erred in overruling defendant's objection to questions to the witness Milton as to the encroachment of defendant's road upon the right of way of plaintiff on the Whitney place the Young land, the Quinn place, the Hendrickson place and the Bousman place. (Pages 361-363 and 2451 of Record.)

69. The court erred in overruling defendant's objection to the question to the witness Milton as to whether or not the lines of the two railroads were correctly indicated upon exhibit 4. (Pages 365 and 2452 of Record.)

70. The court erred in denying defendant's motion to strike out the answer of the witness Milton as to where the first crossing of the two lines occurs going from Farmington towards Durango. (Pages 366-7 and 2452 of Record.)

71. The court erred in overruling defendant's objection to the question to the witness Milton as to whether plaintiff's exhibit 5 correctly shows points of intersection of the two lines on Miller place. (Pages 369 and 2452 of Record.)

72. The court erred in overruling defendant's objection to the question to the witness Milton as to whether the lines of plaintiff and defendant are correctly shown on plaintiff's exhibit 6. (Pages 370 and 2452 of Record.)

73. The court erred in overruling defendant's objection to the

question to the witness Milton as to the distance upon the Right place and adjoining property that the constructed line of the defendant encroaches upon the right of way of plaintiff. (Pages 371 and 2452 of Record.)

74. The court erred in overruling defendant's objection to the question to the witness Milton as to the width of the right of way north of the center line through the same subdivision. (Pages 373 and 2453 of Record.)

75. The court erred in overruling defendant's objection to the question to the witness Milton relative to plaintiff's exhibit II. (Pages 374 and 2453 of Record.)

76. The court erred in overruling defendant's objection to the question to the witness Milton as to the effect upon the located line of plaintiff, the maintenance of defendant's line would have. (Pages 380-1 and 2453 of Record.)

77. The court erred in sustaining plaintiff's objection to the further cross-examination of the witness Milton upon matters 202 relating to the Phelps-Dodge survey. (Pages 397 and 2453 of Record.)

78. The court erred in overruling defendant's objections to the certified copies of the Articles of Incorporation of plaintiff. (Pages 426 and 2453 of Record.)

79. The court erred in overruling defendant's objection to certified copy of amendment to the Articles of Incorporation of plaintiff. (Pages 426-7 and 2454 of Record.)

80. The court erred in overruling defendant's objection to the introduction in evidence of pages 1 to 15 inclusive of the minute book of plaintiff. (Pages 432 and 2454 of Record.)

81. The court erred in overruling defendant's objections to the introduction in evidence of the alleged records of plaintiff as to the adoption of definite locations of line of railway. (Pages 433 and 2454 of Record.)

82. The court erred in denying defendant's motion to strike out all of the records introduced except those recorded at pages 23, 32, 34, 35, and 36. (Pages 434 and 2454 of Record.)

83. The court erred in overruling defendant's objection to the witness Walker stating what he had been informed as to what records of the plaintiff contained. (Pages 435 and 2454 of Record.)

84. The court erred in overruling defendant's objection to the introduction in evidence of a certified copy of amendment of Articles of Incorporation of plaintiff. (Pages 442-3 and 2455 of Record.)

85. The court erred in overruling defendant's objection to 203 the question to the witness Reagan as to the effect of crossings and re-crossings upon the line located by plaintiff. (Pages 466-7 and 2455 of Record.)

86. The court erred in overruling defendant's objection to the proofs of publication of Articles of Incorporation of plaintiff and amendments thereto. (Pages 531 and 2456 of Record.)

87. The court erred in overruling defendant's objections to plaintiff's exhibits numbers 16 and 17. (Pages 532 and 2456 of Record.)

88. The court erred in overruling defendant's objections to plaintiff's exhibit number 18. (Pages 533 and 2456 of Record.)
89. The court erred in overruling defendant's objection to plaintiff's exhibit number 19. (Pages 534 and 2456 of Record.)
90. The court erred in overruling defendant's objection to plaintiff's exhibit number 20. (Pages 535 and 2456 of Record.)
91. The court erred in overruling defendant's objection to plaintiff's exhibit number 1. (Pages 549 and 2456 of Record.)
92. The court erred in overruling defendant's objection to plaintiff's exhibit number 21. (Pages 553 and 2456 of Record.)
93. The court erred in overruling defendant's objection to plaintiff's exhibit number 2-II. (Pages 566 and 2457 of Record.)
94. The court erred in overruling defendant's motion to strike out the answer of the witness Sroufe to the effect that there were no efforts at conformity of grades made at points of intersection by defendant. (Pages 579 and 2457 of Record.)
95. The court erred in overruling defendant's objection to the question to the witness Sroufe as to whether the grade of defendant does or does not conform to the grade adopted by plaintiff. (Pages 579-80 and 2457 of Record.)
96. The court erred in overruling defendant's objection to the questions to the witness Sroufe on the subject of overhead or underneath crossings. (Pages 580 and 2457 of Record.)
97. The court erred in overruling defendant's objection to the question to the witness Sroufe as to the effect upon the located line of plaintiff if defendant be permitted to maintain its road as now constructed. (Pages 582 and 2457 of Record.)
98. The court erred in overruling defendant's objection to the question to the witness Sroufe calling on him to state how much was expended by plaintiff on surveys in New Mexico, in securing rights of way and other expenses. (Pages 588-9 and 2458 of Record.)
99. The court erred in overruling defendant's objection to the question to the witness Sroufe calling on him to state how much was expended by plaintiff in Colorado. (Pages 589 and 2458 of Record.)
100. The court erred in overruling and denying defendant's objections and motion as to questions and answers given by witness Sroufe relative to agreement with W. H. Whitney. (Pages 590, 591, 2458 and 2459.)
101. The court erred in denying defendant's motion to strike out the answer of the witness Sroufe relative to agreement with W. W. McEwen. (Pages 592 and 2459 of Record.)
102. The court erred in denying defendant's objection to plaintiff's exhibit number 11. (Pages 598-9 and 2459 of Record.)
103. The court erred in overruling defendant's objection to plaintiff's exhibit number 22. (Pages 599 and 2459 of Record.)
104. The court erred in overruling defendant's objection to plaintiff's exhibit number 23. (Pages 599 and 2460 of Record.)

105. The court erred in overruling defendant's objection to plaintiff's exhibit number 24. (Pages 600 and 2460 of Record.)

106. The court erred in overruling defendant's objection to the question to the witness McFarland as to whether the Arizona corporation had constructed any line of railroad. (Pages 612-3 and 2460 of Record.)

107. The court erred in overruling defendant's objections to two questions to the witness McFarland as to surveys made by the Arizona corporation. (Pages 613-4 and 2460 of Record.)

108. The court erred in overruling defendant's objection to the question to the witness McFarland as to the purpose of the survey made by the Arizona corporation. (Pages 614 and 2461 of Record.)

109. The court erred in overruling defendant's objection to map marked for identification plaintiff's exhibit number 35. (Pages 663 and 2461 of Record.)

110. The court erred in overruling defendant's objection to the certificates endorsed upon said exhibit number 35. (Pages 664 and 2461 of Record.)

111. The court erred in overruling defendant's objection to 206 blue print marked for identification as plaintiff's exhibit number 36. (Pages 664-5 and 2461 of Record.)

112. The court erred in overruling defendant's objection to the certificates appearing upon plaintiff's exhibit number 36. (Pages 666 and 2462 of Record.)

113. The court erred in overruling defendant's objection to the introduction of certificates on plaintiff's exhibit number 40. (Pages 667 and 2462 of Record.)

114. The court erred in overruling defendant's objection to the introduction of plaintiff's exhibit number 41. (Pages 667 and 2462 of Record.)

115. The court erred in overruling defendant's objection to the introduction of certificates upon said exhibit number 41. (Pages 668 and 2462 of Record.)

116. The court erred in overruling defendant's additional objection to exhibits numbers 35, 36, 40 and 41 and the endorsements thereon. (Pages 669 and 2462 of Record.)

117. The court erred in overruling defendant's objection to plaintiff's exhibit number 28. (Pages 670 and 2462 of Record.)

118. The court erred in overruling defendant's objection to plaintiff's exhibit number 29. (Pages 671 and 2462 of Record.)

119. The court erred in overruling defendant's objection to the introduction of exhibit number 31. (Pages 672 and 2462 of Record.)

120. The court erred in overruling defendant's objection to the introduction of exhibit number 32 and the certificates thereon. (Pages 673 and 2463 of Record.)

121. The court erred in overruling defendant's objection to the introduction of exhibit number 33 and the certificate thereon. 207 (Pages 674 and 2463 of Record.)

122. The court erred in overruling defendant's objection

to the introduction of exhibit number 34. (Pages 674 and 2463 of Record.)

123. The court erred in overruling defendant's objection to the introduction of exhibit number 37 and the endorsements and certificates thereon. (Pages 675 and 2463 of Record.)

124. The court erred in overruling defendant's objection to the introduction of exhibit number 38. (Pages 676 and 2463 of Record.)

125. The court erred in overruling defendant's objection to the introduction of exhibit number 42. (Pages 678 and 2463 of Record.)

126. The court erred in overruling defendant's objection to the exhibit number 43 and its additional objection to exhibit 42. (Pages 679-80 and 2463 of Record.)

127. The court erred in overruling defendant's objection to the introduction of exhibit number 44 and the endorsements and certificates thereon. (Pages 681 and 2463 of Record.)

128. The court erred in overruling defendant's objection to the introduction of exhibit number 45 and the endorsements and certificates thereon. (Pages 682 and 2463 of Record.)

129. The court erred in overruling defendant's objection to the introduction of exhibit number 46 and the certificates and endorsements thereon. (Pages 683 and 2464 of Record.)

130. The court erred in overruling defendant's objection to the introduction of exhibit number 47. (Pages 684 and 2464 of Record.)

208 131. The court erred in overruling defendant's objection to the papers introduced in evidence marked numbers 3807, 3882 and 4412. (Pages 685 and 2464 of Record.)

132. The court erred in overruling defendant's objection to the reading of alleged copy of a letter into the record, which letter purported to be from C. O. Sroufe to E. J. Yard. (Pages 687 and 2464 of Record.)

133. The court erred in overruling defendant's objection to the question to the witness Sroufe as to whether after May 19, 1905 he had any meeting with any engineer representing defendant. (Pages 688 and 2464 of Record.)

134. The court erred in overruling defendant's objection to the question to the witness Sroufe as to what Mr. Gwyn and he did with reference to examination of points of conflict between the two surveys. (Pages 689 and 2464 of Record.)

135. The court erred in sustaining plaintiff's objection to the introduction of defendant's exhibit number 7. (Pages 752-3 and 2465 of Record.)

136. The court erred in qualifying the effect of the admission in evidence of defendant's exhibit number 9, "so that it shall recite the filing of what purports to be such a document or paper as the certificate refers to." (Pages 755 and 2465 of Record.)

137. The court erred in sustaining plaintiff's objection to defendant's exhibit number 266. (Pages 1085 and 2469 of Record.)

138. The court erred in sustaining the plaintiff's objection to defendant's exhibit number 268. (Pages 1095 and 2470 of Record.)

139. The court erred in sustaining plaintiff's objection to defendant's exhibit number 4. (Pages 1120-1 and 2470 of Record.)

140. The court erred in sustaining plaintiff's objection to defendant's exhibit number 269. (Pages 1123 and 2470 of Record.)

141. The court erred in sustaining plaintiff's objection to defendant's exhibit number 269A. (Pages 1124 and 2471 of Record.)

142. The court erred in sustaining plaintiff's objections to the defendant's exhibits numbers 270, 270A and 271. (Pages 1125-6 and 2471 of Record.)

143. The court erred in sustaining plaintiff's objection to defendant's exhibit number 272. (Pages 1127-8 and 2471 of Record.)

144. The court erred in making its second finding of facts because there is no evidence to support the statement that a portion of the line authorized by the terms of the charter of plaintiff extends from the boundary line between Colorado and New Mexico down the Animas valley to the town of Farmington. (Page 2476 of Record.)

145. The court erred in making its third finding of facts because it is indefinite as to when plaintiff adopted the line of railroad between the boundary line of Colorado and New Mexico and the town of Farmington and because there is no competent evidence to show that plaintiff ever adopted such line at any time. (Pages 2476-7 of Record.)

146. The court erred in making its fourth finding of facts because there is no competent evidence to show that the line indicated upon the map and profile referred to in said finding was ever adopted by plaintiff and therefore it is immaterial whether such map and profile were ever filed any where or not. (Page 2477 of Record.)

147. The court erred in making its fifth finding of facts because it is immaterial to the case of plaintiff that the map therein referred to was filed in the United States Land Office as no part of the line shown by said map passes over the public domain. (Page 2477 of Record.)

148. The court erred in making its sixth finding of facts because the same is not supported by the evidence, is indefinite and uncertain; and because it is *immaterial that plaintiff had negotiations with Whit-* agreements as are referred to therein and because it is immaterial that plaintiff had negotiations with Whitney and McEwen as referred to. (Pages 2477-8 of Record.)

149. The court erred in making its seventh finding of facts because it assumes that plaintiff adopted and acquired the said line between said points hereinbefore stated, when there is no competent evidence to support that assumption, nor is there any sufficient evidence to support the statement that said line is the best line and the best line obtainable between said points. (Pages 2478-9 of Record.)

150. The court erred in making its eighth finding of fact because the same is immaterial and because it is not supported by sufficient evidence. (Pages 2479-80 of Record.)

151. The court erred in making its ninth finding of facts because the same is immaterial and indefinite and not supported by sufficient evidence. (Page 2480 of Record.)

152. The court erred in making its tenth finding of facts because the same is immaterial and not supported by sufficient evidence. (Pages 2480-1 of Record.)

153. The court erred in making its eleventh finding of facts because the same is immaterial and not supported by sufficient evidence. (Pages 2481-2 of Record.)

154. The court erred in its twelfth finding of facts because the same is immaterial and is not supported by the evidence. (Page 2482 of Record.)

155. The court erred in making its thirteenth finding of facts because the same is not positive and is not supported by sufficient evidence. (Pages 2482-3 of Record.)

156. The court erred in making its fourteenth finding of facts because the same is not supported by sufficient evidence. (Page 2483 of Record.)

157. The court erred in making its fifteenth finding of facts because the same is not supported by sufficient evidence. (Page 2483 of Record.)

158. The court erred in making its sixteenth finding of facts because the same is not supported by sufficient evidence and is based in part upon the incorrect assumption that the line in controversy had been adopted by plaintiff company. (Page- 2483-4 of Record.)

159. The court erred in making its seventeenth finding of facts which is not supported by the evidence and incorrectly assumes the adoption of the alleged line of plaintiff. (Page 2485 of Record.)

160. The court erred in making its eighteenth finding of facts because the same is not supported by sufficient evidence. (Page 2485 of Record.)

161. The court erred in making its nineteenth finding of facts because the same is immaterial, indefinite and not supported by the evidence and incorrectly assumes the adoption of said line by plaintiff. (Page 2485 of Record.)

162. The court erred in making its twenty-first finding of facts because the same incorrectly assumes that plaintiff is the owner of the right of way, of which there is no evidence. (Page 2486 of Record.)

163. The court erred in making its twenty-second finding of facts because the same is not supported by sufficient evidence, and incorrectly assumes the adoption of the said line by plaintiff. (Pages 2486-7 of Record.)

164. The court erred in making its twenty-third finding of facts because the same is wholly immaterial. (Page 2487 of Record.)

165. The court erred in making its twenty-fourth finding of facts because the same is wholly immaterial, and not supported by competent evidence. (Page 2487 of Record.)

166. The court erred in making its twenty-fifth finding of facts because the same is wholly immaterial. (Page 2488 of Record.)

167. The court erred in making its twenty-sixth finding of facts

because the same is not supported by the evidence and is immaterial. (Page 2488 of Record.)

168. The court erred in making its twenty-seventh finding of facts because the same is not supported by the evidence, is inaccurate, and is a mere statement of two alternative inferences drawn from assumed facts instead of being a finding of any fact in itself, while neither of the inferences so drawn naturally follows from the facts assumed. (Pages 2488-9 of Record.)

169. The court erred in making its twenty-eighth finding of facts because so far as it attempts to state any fact it is not supported by the evidence and is in great part a conclusion of law instead of a finding of facts. (Page 2489 of Record.)

170. The court erred in making its conclusions of law because they were not justified by the facts disclosed by the evidence or found by the court. (Pages 2490-1 of Record.)

171. The court erred in granting the relief asked by plaintiff because the record shows no danger of irreparable injury from the acts of defendant.

172. The court erred in granting the relief asked by plaintiff because the record shows that plaintiff has an adequate remedy at law for anything complained of in this case.

173. The court erred in granting the relief asked by plaintiff because the record shows no possible injury to plaintiff which cannot be fully compensated by damages, recoverable in an action at law.

174. The court erred in granting the relief asked by plaintiff because the record shows that plaintiff has never been in the possession of its alleged right of way nor has it ever been even entitled to such possession.

175. The court erred in refusing to make finding of fact number 1, asked by defendant, said finding being material and fully supported by the evidence. (Page 2492 of Record.)

176. The court erred in refusing to make finding of fact number 2, asked by defendant, said finding being material and fully supported by the evidence. (Page 2492 of Record.)

177. The court erred in refusing to make finding of fact number 3, asked by defendant, said finding being material and fully supported by the evidence. (Pages 2492-3 of Record.)

178. The court erred in refusing to make finding of fact number 4, asked by defendant, said finding being material and fully supported by the evidence. (Page 2493 of Record.)

179. The court erred in refusing to make finding of fact number 5, asked by defendant, said finding being material and fully supported by the evidence. (Page 2493 of Record.)

180. The court erred in refusing to make finding of fact number 6, asked by defendant, said finding being material and fully supported by the evidence. (Pages 2494-5 of Record.)

181. The court erred in refusing to make finding of fact number 7, asked by defendant, said finding being material and fully supported by the evidence. (Page 2495 of Record.)

182. The court erred in refusing to make finding of fact number

8, asked by defendant, said finding being material and fully supported by the evidence. (Page 2495 of Record.)

183. The court erred in refusing to make finding of fact number 9, asked by defendant, said finding being material and fully supported by the evidence. (Pages 2495-6 of Record.)

184. The court erred in refusing to make finding of fact number 10, asked by defendant, said finding being material and fully supported by the evidence. (Page 2496 of Record.)

185. The court erred in refusing to make finding of fact number 11, asked by defendant, said finding being material and fully supported by the evidence. (Page 2496 of Record.)

215 186. The court erred in refusing to make finding of fact number 12 asked by defendant, said finding being material and fully supported by the evidence. (Pages 2496-7 of Record.)

187. The court erred in refusing to make finding of fact number 13, asked by defendant, said finding being material and fully supported by the evidence. (Page 2497 of Record.)

188. The court erred in refusing to make finding of fact number 14, asked by defendant, said finding being material and fully supported by the evidence. (Page 2498 of Record.)

189. The court erred in refusing to make finding of fact number 15, asked by defendant, said finding being material and fully supported by the evidence. (Page 2498 of Record.)

190. The court erred in refusing to make finding of fact number 16, asked by defendant, said finding being material and fully supported by the evidence. (Pages 2498-9 of Record.)

191. The court erred in refusing to make finding of fact number 17, asked by defendant, said finding being material and fully supported by the evidence. (Page 2492 of Record.)

192. The court erred in refusing to make finding of fact number 18, asked by defendant, said finding being material and fully supported by the evidence. (Pages 2499-2500 of Record.)

193. The court erred in refusing to make finding of fact number 19, asked by defendant, said finding being material and fully supported by the evidence. (Page 2500 of Record.)

216 194. The court erred in refusing to make finding of fact number 20, asked by defendant, said finding being material and fully supported by the evidence. (Page 2500 of Record.)

195. The court erred in refusing to make finding of fact number 21, asked by defendant, said finding being material and fully supported by the evidence. (Pages 2500-1 of Record.)

196. The court erred in refusing to make finding of fact number 22, asked by defendant, said finding being material and fully supported by the evidence. (Page 2501 of Record.)

197. The court erred in refusing to make finding of fact number 23, asked by defendant, said finding being material and fully supported by the evidence. (Page 2502 of Record.)

198. The court erred in refusing to make finding of fact number 24, asked by defendant, said finding being material and fully supported by the evidence. (Pages 2502-3 of Record.)

199. The court erred in refusing to make finding of fact number

25, asked by defendant, said finding being material and fully supported by the evidence. (Page 2503 of Record.)

200. The court erred in refusing to make finding of fact number 26, asked by defendant, said finding being material and fully supported by the evidence. (Page 2504 of Record.)

201. The court erred in refusing to make finding of fact number 27, asked by defendant, said finding being material and fully supported by the evidence. (Page 2504 of Record.)

202. The court erred in refusing to find the conclusion of law number 1, asked by defendant because the same is a correct statement of law based upon facts disclosed by the evidence. (Page 2514 of Record.)

203. The court erred in refusing to find the conclusion of law number 2, asked by defendant, because the same is a correct statement of law based upon the facts disclosed by the evidence. (Pages 2514-5 of Record.)

204. The court erred in refusing to find the conclusion of law number 3, asked by defendant, because the same is a correct statement of law based upon the facts disclosed by the evidence. (Page 2515 of Record.)

205. The court erred in refusing to find the conclusion of law number 4, asked by defendant, because the same is a correct statement of law based upon the facts disclosed by the evidence. (Page 2515-6 of Record.)

206. The court erred in refusing to find the conclusion of law number 5, asked by defendant, because the same is a correct statement of law based upon the facts disclosed by the evidence. (Page 2516 of Record.)

207. The court erred in refusing to find the conclusion of law number 6, asked by defendant, because the same is a correct statement of law based upon the facts disclosed by the evidence. (Page 2516 of Record.)

208. The court erred in refusing to find the conclusion of law number 7, asked by defendant, because the same is a correct statement of law based upon the facts disclosed by the evidence. (Pages 2516-7 of Record.)

209. The court erred in refusing to find the conclusion of law number 8, asked by defendant, because the same is a correct statement of law based upon the facts disclosed by the evidence. (Page 2517 of Record.)

210. The court erred in refusing to find the conclusion of law number 9, asked by defendant, because the same is a correct statement of law based upon the facts disclosed by the evidence. (Pages 2517-8 of Record.)

211. The court erred in refusing to find the conclusion of law number 10, asked by defendant, because the same is a correct statement of law based upon the facts disclosed by the evidence. (Page 2518 of Record.)

212. The court erred in refusing to find the conclusion of law number 11, asked by defendant, because the same is a correct state

ment of law based upon the facts disclosed by the evidence. (Page 2518 of Record.)

213. The court erred in refusing to find the conclusion of law number 12, asked by defendant, because the same is a correct statement of law based upon the facts disclosed by the evidence. (Page 2518 of Record.)

214. The court erred in refusing to find the conclusions of law, asked by defendant, numbered from 1 to 12, because the same fully and correctly state the law as applied to the facts disclosed by the evidence in this case.

215. The court erred in failing to dismiss the plaintiff's complaint.

216. The court erred in finding the issues herein with the plaintiff and that the plaintiff is entitled to the relief prayed. (Page 2520 of Record.)

217. The court erred in entering judgment as in a case of ejectment, for the recovery from defendant of the possession of lines and railroad right of way of plaintiff by it adopted, surveyed and located upon, when plaintiff has never shown any title to this so-called right of way which would justify such a judgment, nor even a prior possession for that purpose, nor has the plaintiff ever adopted, in the manner required by law, any such line or right of way.

Wherefore, defendant prays that the said judgment and decree of the court below be vacated, set aside, reversed and altogether held for nothing, and that this cause be dismissed or that such other judgment may be entered herein as justice may require and to the court shall seem meet.

FRANK W. CLANCY,
Attorney for Appellant.

220 And Afterwards, on to wit, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe the Seat of Government, on the first Wednesday after the first Monday in January, A. D. 1908, on the twelfth day of the said term, the same being Monday August 31st, A. D. 1908, the following among other proceedings were had and entered of record, to wit:

No. 1237.

ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO,
Appellee,

vs.

DENVER & RIO GRANDE RAILROAD COMPANY, Appellant.

Appeal from District Court, San Juan County.

It is ordered by the court that this cause be and the same hereby is continued for the term.

And Afterwards on to wit, on the 6th day of January A. D., 1909 there was filed in the office of the Clerk of the Supreme Court of the

Territory of New Mexico, a stipulation of counsel in the above entitled cause, which said stipulation of counsel was and is in the following words and figures *following* to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1909.

No. 1237.

THE ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO,
Appellee,

vs.

THE DENVER & RIO GRANDE RAILROAD COMPANY, Appellant.

It is hereby stipulated and agreed by and between the said parties in the above-entitled cause that said cause may be continued until the next session of said court.

(Signed)

FRANK W. CLANCY,

Attorney for Appellant.

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T. B. CATRON,

Attorney for Appellee.

And Afterwards, on to wit At a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of Government, on the first Wednesday after the first Monday in January A. D., 1909, on the first day of the said regular term, the same being Wednesday, January 6th, A. D. 1909, the following among other proceedings were had and entered of record, to wit:

No. 1237.

THE ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO,
Appellee,

vs.

THE DENVER & RIO GRANDE RAILROAD COMPANY, Appellant.

Appeal from District Court, San Juan County.

It is ordered by the court that this cause be and the same hereby is continued until the first adjourned session of this court.

And Afterwards, on to wit, at the said regular term of the Supreme Court, on the Seventeenth day thereof, the same being Saturday, August 28th, A. D., 1909, the following amongst other proceedings were had and entered of record, to wit:

No. 1237.

THE ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO,
Appellee,
vs.
THE DENVER AND RIO GRANDE RAILROAD COMPANY, Appellant.

Appeal from District Court.

It is ordered by the court, owing to the absence of F. W. Clancy, Esq., Attorney for Appellant, that this cause be and the same hereby is continued for the term.

222 And Afterwards, on to wit, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe the seat of Government on the first Wednesday after the first Monday in January, on the first day thereof, the same being Wednesday, January 5th, A. D., 1910, the following amongst other proceedings were had and entered of record, to wit:

No. 1237.

THE ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO,
Appellee,
vs.
DENVER & RIO GRANDE RAILROAD COMPANY, Appellant.

Appeal from District Court, San Juan County.

It is ordered by the court that this cause be and the same hereby is re-set for hearing for the first adjourned session of this Court.

And Afterwards, on to wit, on the fifth day of the said regular term, A. D., 1910, the same being Tuesday, July 19th A. D., 1910, the following amongst other proceedings were had and entered of record, to wit:

No. 1237.

THE ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO,
Appellee,
vs.
DENVER & RIO GRANDE RAILROAD COMPANY, Appellant.

Appeal from District Court, San Juan County.

It is ordered by the court that this cause be and the same hereby is continued for the term.

And Afterwards, on to wit, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of Government, on the first Wednesday after the first Mon-

day in January, A. D., 1911, on the first day of the said regular term, the same being Wednesday, the fourth day of January, 223 A. D., 1911, the following among other proceedings were had and entered of record to-wit:

No. 1237.

THE ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO,
Appellee,

vs.

THE DENVER & RIO GRANDE RAILROAD COMPANY, Appellant.

Appeal from District Court, San Juan County.

It is ordered by the court that the parties herein be and they hereby are granted two hours each side for the oral argument of this case.

And Afterwards, on to wit: *on* the Second day of the said Regular term, the same being Thursday the 5th day of January A. D., 1911, the following among other proceedings were had and entered of record to wit:

No. 1237.

THE ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO,
Appellee,

vs.

THE DENVER & RIO GRANDE RAILROAD COMPANY, Appellant.

Appeal from District Court, San Juan County.

This cause coming on for hearing upon the transcript of record, assignment of errors and briefs of counsel, is argued by F. W. Clancy, Esq. for Appellant and Ritter and Buchanan and Thomas B. Catron, Esq. for Appellee and submitted to the court, and the Court being sufficiently advised in the premises takes the same under advisement.

Associate Justice Mechem not having heard the argument in this case it is agreed by counsel for both sides that he shall participate in the consideration and decision of this case upon the briefs and 224 printed argument herein and it is so ordered.

And Afterwards, on to wit: *on* the Thirty-first day of the said Regular term, the same being Saturday August 25th, A. D., 1911, the following among other proceedings were had and entered of record to wit:

No. 1237.

THE ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO,
Appellee,

vs.

THE DENVER & RIO GRANDE RAILROAD COMPANY, Appellant.

Appeal from District Court, Bernalillo County, on Change of Venue
from San Juan County.

This cause having been argued by counsel, submitted to and taken under advisement by the court upon a former day of the present term, and the court having had the same under advisement and being now sufficiently advised in the premises, announces its decision by Associate Justice Edward R. Wright, Chief Justice Pope and Associate Justices Parker, Mechem and Roberts, concurring, affirming the judgment of the court below, for reasons stated in the opinion of the Court on file; It is therefore considered and adjudged by the Court that the judgment of the District Court Bernalillo, whence this cause came into this court, be and the same hereby is affirmed, and that in accordance therewith, It is Considered, ordered. Adjudged by the Court that the issues herein be and they are found with the plaintiff; and that the plaintiff is entitled to the relief prayed herein, subject only to the limitation or condition that it shall not be authorized to oust the defendant from the possession of that portion of the line in controversy now occupied by defendant company in the actual operation of its line of railway until such time as plaintiff shall have constructed at least twenty-one miles of railroad, substantially complete for use within the Territory of New Mexico, along the line adopted by it as set forth and described in its complaint, and shall actually enter upon the grading of its

225 adopted line of railway between Farmington New Mexico and Durango Colorado, along said line; and provided that the plaintiff shall have complied with all conditions precedent to such construction, still to be performed by it in order to conform to the provisions of the law of New Mexico relating to the laying out and construction of railroads.

It is Considered, Ordered, Adjudged and Decreed by the Court that the plaintiff, The Arizona & Colorado Railroad Company of New Mexico, do have and recover of and from the defendant The Denver & Rio Grande Railroad Company, the possession of the said lines and railroad right-of-way of the said plaintiff, by its adopted, surveyed and located, as described in the complaint herein, and as set forth in the maps and profiles filed in the office of the Secretary of the Territory of New Mexico, and in the office of the Probate Clerk and Ex-Officio Recorder of the County of San Juan, in the Territory of New Mexico, and that the said defendants vacate and surrender to plaintiff the possession thereof, when the said plaintiff shall have constructed at least twenty-miles of railroad substantially complete for use, within the Territory of New Mexico along the line adopted by it as set forth and described in its complaint, and

shall actually enter upon the grading of its line of railroad between Farmington, New Mexico and Durango Colorado, along the said line adopted by plaintiff and in said complaint described and provided that the plaintiff shall have complied with all conditions precedent to such construction still to be performed by it in order to conform to the provisions of the laws of New Mexico, relating to the laying out and construction of railroads.

It is Further Considered, Order-, Adjudged and Decreed, That the right of plaintiff to enter upon said right-of-way, and to take grade and possess the same as hereinabove decreed, and the duty of the defendant to vacate and surrender to plaintiff the possession thereof, shall be limited in time to the space and period ending five years from the date of the decree.

226 It is Further Considered, Ordered, Adjudged and Decreed, that the said defendant be and it is restrained and enjoined henceforth from prosecuting any condemnation suits or actions now pending or which might be hereafter by defendant instituted, insofar as such suits or actions may in any wise affect the rights and interests of the plaintiff company in and to the said line, so located and adopted by it, and hereinabove mentioned.

It is Further Considered, Ordered, Adjudged and Decreed that the said defendant be and it hereby is restrained and enjoined henceforth from any *make* further or other entry or trespass upon the said line of road so adopted and located by said plaintiff, and hereinabove mentioned except in so far as it is by this decree expressly permitted to continue the operation of its road as now constructed until such time as in this decree above provided.

It is Further Considered, Ordered, Adjudged and Decreed, that the plaintiff do further have and recover of and from the defendant and appellant its costs herein to be taxed.

And Afterwards, on to wit, *on* the Thirty-second day of the said regular term, the same being Wednesday August 30th A. D., 1911 the following among other proceedings were had and entered of record to wit:

No. 1237.

THE ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO,
Appellee,

vs.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, Appellant.

Appeal from District Court, Bernalillo County.

Upon the motion of Harry S. Clancy, Esq. It is ordered by the court that the appellant herein do have until the first day of October within which to file motion for rehearing herein.

227 And Afterwards, on to wit, on the 30th day of September, A. D., 1911 there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a motion for

a rehearing in the above entitled cause, which said motion for a rehearing was and is in the following words and figures *following* to wit:

In the Supreme Court of New Mexico, January Term, 1911.

No. 1237.

ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO,
vs.
DENVER & RIO GRANDE RAILROAD COMPANY, Appellant.

Motion for Rehearing.

Now comes the appellant, and moves the court for a rehearing of this cause, for the following reasons:

First. The opinion of the court is in conflict with and departs from, the rule laid down for the review of such cases as this, by this court in *Ford vs. Springer Land Association*, 8 N. M. 67, to which attention has not been called through oversight of counsel.

Second. The court bases its judgment upon the findings of the court below, and not upon an examination of the whole
228 record "without reference to the findings of fact and conclusions of law in the lower court" as required by the decision of this court, above cited.

Third. The court appears to have overlooked, and failed to consider, the point, decisive of the cause, duly submitted by counsel, that there is no competent evidence of adoption by appellant, of any line running into the town of Farmington.

Fourth. The court appears to have overlooked, and to have failed to consider, the point, decisive of the cause, duly submitted by counsel, and never met or controverted by plaintiff, either in its brief or on the oral argument, that plaintiff's line is positively and demonstrably a bad line at important points.

Fifth. Although it is mentioned in the opinion, yet it seems that the court has overlooked, and has failed to consider, the point, duly submitted by counsel, that there is no word of evidence in the record to show either ability of plaintiff to construct any railroad, or any good faith in what it has done.

Sixth. Although it is mentioned in the opinion, yet it seems that the court has overlooked, and has failed to consider, the point, duly submitted by counsel, that plaintiff has been guilty of such laches and delay as to deprive it of any right to relief in a court of equity.

FRANK W. CLANCY,
Counsel for Appellant.

229 And Afterwards on to wit, *on* the fortieth day of the said regular term, the same being Tuesday, December, the 5th A. D., 1911, the following among other proceedings were had and entered of record, to wit:

No. 1237.

THE ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO,
Appellee,

vs.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, Appellant.

Appeal from District Court, Bernalillo County.

This cause coming on before the court upon the motion of appellant for rehearing herein and the court having had said motion under advisement and being now sufficiently advised in the premises, denies the same. It is therefore considered and adjudged by the court that the motion of appellant herein for a rehearing be and the same hereby is denied.

And Afterwards, on to wit, *on* the Fourtieth day of the said regular term, the same being December 5th, A. D., 1911 the following among other proceedings were had and entered of record to wit:

No. 1237.

THE ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO,
Appellee,

vs.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, Appellant.

Appeal from District Court, Bernalillo County.

This cause coming on before the court upon the request of F. W. Clancy, Esq. Attorney for appellant for a finding of facts by this court in the nature of a special verdict, and the court being sufficiently advised in the premises grants the said motion and makes the findings of the court below herein, the findings of this court. It is therefore considered and adjudged by the court that the findings of fact made by the court below in this cause be and the same hereby
are adopted as the findings of fact by this court in this cause
230 in nature of a special verdict.

And Afterwards, on to wit, *on* the Forty-seventh day of the said regular term, the same being Friday December 22nd the following among other proceedings were had and entered of record to wit:

No. 1237.

THE ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO,
Appellee,

vs.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, Appellant.

Appeal from District Court, Bernalillo County.

This cause coming on before the court upon the motion of attorney for appellant for additional findings of fact and the court being

sufficiently advised in the premises hereby adopts the additional findings of fact as the same have been signed by the Chief Justice and filed in the office of the Clerk of this Court. It is therefore considered and adjudged by the court that the additional findings of fact signed by the Chief Justice and duly filed in the office of the Clerk of this court, be and the same hereby are adopted as the additional findings of this court in the nature of a special verdict in the above entitled cause, which said findings of fact as found by the

court are in the following words and figures to wit:

231 1. The court finds that the cost of a re-location of plaintiff's line would not exceed seventy-five dollars per mile.

2. The court finds that coming from the north the first point of interference between the two lines, is on the property of William H. Whitney, close to the east end of a rocky hill, near the place called Cedar Hill, and will be herein referred to as the Whitney Crossing; that from the Whitney crossing to the next crossing of the two lines is about two miles and a half, and that crossing is upon the land of W. W. McEwen, and will be herein referred to as the McEwen crossing; that from the McEwen crossing to the town of Aztec is about eight and one-half miles, and the next crossing, on the land of Miss Young, is about two and one-half miles below Aztec, and will be referred to as the Young crossing; that from the Young crossing to the next one, which is on the land of Frank M. Quinn, which will be referred to as the Quinn crossing, is a little over six miles; that from the Quinn crossing to the next one, which is on the land of Marion B. Hendrickson, and will be referred to as the Hendrickson crossing, is a little over a mile; that from the Hendrickson crossing to the next one, on the land of Thomas R. Bouseman, which will be referred to as the Bouseman crossing, is about half a mile; that within less than a mile farther, on the land of William Sutherland, there is an encroachment of the two lines, close to which is another encroachment upon the land of James E. McCarthy; that about two miles farther is an encroachment and crossing of the two lines on the land of Benjamin Ricketts, which encroachment continues beyond the land of Ricketts for some distance, there being a final crossing of the two lines on the land of Allison F. Miller, about half a mile from the land of Ricketts, all of said crossings and encroachments fully appearing on defendant's exhibits 270 and 270a, which are made a part of these findings, to be included in the transcript on appeal.

232 3. The court finds that at a point a little less than one mile

and a half north of the Whitney crossing there begins at the Engineer's station marked 1093 x 12 P. T. on the line of defendant, a tangent or straight line which continues to said Whitney crossing; that at the point of beginning of said tangent the surveyed line of plaintiff is about two hundred feet west of the line of defendant, and the line of plaintiff from that point in a southerly direction runs parallel with defendant's line for a distance of about two thousand feet, there reaching the end of a tangent of about one and one-quarter miles in length, at which point plaintiff's line makes a slight curve to the right, and at a distance from that point of

about two thousand two hundred feet makes another curve to the left, and a few hundred feet from that curve another slight curve to the right, thence running in a straight line to the point of intersection, and that at the widest point of divergence between the two lines there is a distance of about six hundred feet, all of which will more clearly appear by reference to defendant's exhibit 270, which is adopted as a part of these findings and as illustrative thereof, to be included as a part of the transcript of this case upon appeal.

4. The court further finds that if plaintiff's line were so located as to avoid the curvature described in the last preceding paragraph and were continued upon a straight line from a point opposite the beginning of the tangent on defendant's line, it could have a tangent of nearly two and one-half miles before it would approach the line of defendant, and that the only obstacle to the construction of its road upon such a tangent would be the necessary cutting through the hill above referred to, at a distance of about two hundred feet from defendant's line, and that the added expense thereby caused, could be definitely ascertained and measured in money.

5. The court finds that defendant by its general attorney, Mr. E. N. Clark, on the third day of the taking of testimony by the referee, offered to plaintiff, then and there represented by its attorneys only, who were engaged in taking said testimony, as appears

233 by the referee's record of proceedings before him, to consent to the construction by plaintiff of its line upon the right-of-way around the point of said hill, with only the necessary clearance between tracks, and that this offer was substantially repeated in the brief of defendant filed in this court; and that if plaintiff should avail itself of this offer by defendant and would continue its tangent from the point above referred to, to a point within a short distance of the point of said hill, it could with a very slight curve, cut the point of said hill upon defendant's right-of-way at an added cost for construction of not to exceed six thousand dollars.

6. The court finds that defendant's constructed line from Engineer's station 2127 x 93, a little more than half way from Mile post 489 to Mile post 490, to Engineer's station 2883 x 23, about two thousand feet beyond Mile post 492, a distance of about three miles, is a tangent or straight line, while over the same distance there are no less than five curves in plaintiff's surveyed line, and that there are three intersections of the two lines, being those known as the Quinn, Hendrickson and Bouseman crossings, as will clearly appear by reference to defendant's exhibit 270a, which is adopted as a part of these findings, to be included as a part of the record in this case upon appeal.

7. The court finds that from the point hereinbefore referred to as the beginning of a tangent on the line of defendant, at Engineer's station marked 1093 x 12 P. T., plaintiff could, by paralleling the constructed line of defendant on the west side thereof, all the way to the town of Farmington, have a line with very much less curvature not only at the points hereinbefore specified, but at numerous other places, as will fully appear from an examination of de-

defendant's exhibit 270 and 270a, which are adopted as a part of these findings, to be included in the record upon appeal, and that any additional expense of locating and constructing such a line can be readily ascertained and measured in money.

234 8. The court finds that there is neither allegation nor proof of any inability on the part of the defendant to pay any damages which might possibly be incurred by plaintiff in consequence of any change in its surveyed line.

9. The court finds that plaintiff's exhibits 35 and 36 show the alleged survey and line, to protect which plaintiff invokes the aid of the court, and said exhibits are adopted as a part of these findings, to be included in the record of the case on appeal.

10. The court finds that every order made by plaintiff's board of directors as to adoption of surveyed lines has been put in evidence, and yet the record does not show any order by that board of the adoption of the line appearing on plaintiff's exhibits 35 and 36, but that there are two orders of adoption, under dates of October 24, 1904, and December 3, 1904, respectively, of the lines shown on defendant's exhibits 3a and 3, which are copies of maps filed by plaintiff in the United States Land Office on October 27, 1904, and December 7, 1904, respectively, and which are hereby adopted as a part of these findings, to be included in the transcript of record upon appeal.

11. The court finds that the line thus adopted by plaintiff's board of directors, shown on defendant's exhibits 3a and 3 is in part identical with the line shown on plaintiff's exhibits 35 and 36, that is to say, from the Colorado state line down to a point about a mile and a half northeast of the town of Aztec the lines are identical, but at that point the lines diverge, reuniting at a point between six and a half and seven miles farther down the valley of the Animas, and continuing together for a distance of somewhat less than five miles to a point close to the Bouseman crossing, where the two lines again diverge, the one shown on defendant's exhibits 3a and 3 turning away from the valley of the Animas on its course towards its terminus at the mouth of the Gallegos Cañon on the San Juan river, and that plaintiff's line from the point of divergence northeast of Aztec to the place where the lines reunite, and from

235 the point of the second divergence to the town of Farmington, a distance of approximately three and a half miles, is not covered by any order of adoption made of record by plaintiff's board of directors, all of which will clearly appear by reference to defendant's exhibit 2, upon which are shown defendant's constructed line and both of the lines of plaintiff, which exhibit is adopted as a part of these findings, to be included in the transcript of record on appeal.

12. The court finds that the adoption of that portion of plaintiff's alleged line between the point of the first divergence of its two lines northeast of the town of Aztec to the point where those lines reunite, and from the point of the second divergence to the town of Farmington, is shown by the oral statement of plaintiff's witness E. A. McFarland, plaintiff's chief engineer, who stated, with refer-

ence to exhibits Nos. 28 to 41, inclusive, that they were copies of maps and profiles presented by him and adopted by the board of directors of plaintiff, from a point on the boundary line between Colorado and New Mexico near where the Rio Las Animas crosses the same, thence following the valleys of the Las Animas, San Juan and Chaco rivers to a point near Manuelito on the Santa Fe Pacific railroad, near the boundary line between Arizona and New Mexico, as to which statement defendant immediately moved that it be stricken out, because involving the witness' conclusion and not constituting the best evidence of such action, the minutes of the meetings of the board of directors being the best and only proper evidence of its action, which motion was afterward denied, and defendant excepted to the ruling of the court.

13. The court finds that the Young crossing is below the point of divergence of plaintiff's two lines, and on that portion as to which no order of adoption was made of record by plaintiff's board of directors, but within the limits testified to by McFarland, as stated in the last finding, and that plaintiff acquired title for a right-of-way across the Young land by a deed from Edith Young, 233 conveying 6.59 acres, executed May 9, 1905, and recorded in the county records of San Juan county on May 12, 1905, and that at the time of the execution of said deed a condemnation proceeding begun by defendant under the statute of New Mexico, was pending against said Edith Young for the purpose of condemning a portion of the land embraced within the right-of-way described in said deed, but notice of such proceeding had not been served.

14. The court finds that the Bouseman crossing is almost exactly at the point of the second divergence of the two lines of plaintiff, and that the encroachments and interferences on the land of Sutherland, Ricketts and Miller are all below the point of divergence between it and the town of Farmington, and on that portion of plaintiff's line as to which no order of adoption by plaintiff's board of directors has been shown except as by McFarland's evidence hereinbefore set out; and upon this portion of plaintiff's line the court finds that plaintiff has acquired land for its right-of-way over the land of A. F. Miller by deed dated June 5, 1905, conveying 3.05 acres, and recorded in the county records of San Juan county June 7, 1905.

15. The court finds that plaintiff has acquired no legal title to any land for its right-of-way except such as may have been conveyed by the deeds hereinbefore mentioned from Edith Young and A. F. Miller and wife.

16. The court finds that the only evidence from which any inference can be drawn in favor of plaintiff's good faith and intention and ability to construct its proposed railroad line, is to be found in the fact that it expended about one hundred and thirteen thousand dollars in surveys of its numerous proposed lines, of which the portion here in controversy is only a small part, but in this connection the court also finds as a fact of which it will take judicial notice, that plaintiff has not to the present time constructed a single mile

of railway anywhere in the Territory of New Mexico on any of its proposed lines.

237 17. The court finds that all of the agreements with owners of lands which are referred to in the sixth finding of facts made by the court below, by terms of express limitation therein contained expired in the early part of the year 1906, with the exception of three of such agreements, which three agreements were with Thomas R. Bouseman and wife, dated December 12, 1904, James E. McCarthy and wife, dated December 20, 1904, and acknowledged February 3, 1905, and W. N. Kight, dated December 21, 1904, and contained no limitation as to time within which they were to be carried out. The court further finds as to said three agreements that they were never recorded in the records of deeds in the county in which the lines were situate, and each recited merely that it had been rendered probable that the line and track of plaintiff might be finally located over the lands of the parties above mentioned, without specifying any particular part thereof, and the agreements were to be effective only if the tracks of plaintiff's railway should be finally and permanently located over and across said lands. The court further finds that the record does not disclose whether plaintiff has availed itself of any right given by any of the said agreements to obtain title to land, except in the obtaining of deeds from Edith Young and A. F. Miller, as hereinbefore stated.

18. The court finds that the engineer referred to in the latter part of the nineteenth finding of facts made by the court below, was one Lee B. Furman; that the evidence as to any work done, or as to any line located, by said Furman for plaintiff is that which was given on behalf of plaintiff, to the effect that Mr. Furman had charge of the party which located the line from Aztec to the mouth of the Gallegos canyon, which is the line shown on defendant's exhibit 3, and which diverges from the valley of the Animas and from the line to protect which this suit was brought, at or near the Bouseman crossing and was completed November 17, 1904; that there is no evidence whatever as to when, or by whom.

238 plaintiff's line between the Bouseman crossing and the town of Farmington was located, beyond the statement of one of plaintiff's engineer witnesses that it was subsequently surveyed and that C. L. Mitton, locating engineer, started the line from a point on the Bouseman land to the town of Farmington, within two or three days after November 24, 1904, and the allegation in plaintiff's bill of complaint that plaintiff had completed its surveys to the town of Farmington about the first day of February, 1905.

19. The court finds that the line shown on defendant's exhibit 3a, which is made a part of these findings, was adopted by a resolution of plaintiff's directors on October 24, 1904, and was based on a survey which ended on October 21, 1904, while the map of which said exhibit 3a is a copy was filed in the Land Office at Santa Fe on October 27, 1904; and that the line shown on defendant's exhibit 3, which is made a part of these findings, was adopted by a resolution of plaintiff's directors on December 3, 1904, and was based on a survey which ended on November 19, 1904, while the map of

which said exhibit 3 is a copy was filed in the Land Office at Santa Fe on December 7, 1904.

20. The court finds that the maps of which plaintiff's exhibits 35 and 36 are copies, which exhibits are made a part of these findings and which show the alleged line to protect which this suit was brought, were not filed in any public office until May 13, 1905, one day after this suit was begun, and that the bill of complaint avers that plaintiff's surveys into the town of Farmington were completed about the first day of February, 1905.

21. The court finds that defendant's constructed line is on the east side of the Animas river after crossing the Colorado state line, and so continues until forced by the proximity of bluffs at the base of which it is located, to cross the river to the west side about six miles north of the Whitney crossing.

22. The court finds that plaintiff claims to have definitely located and adopted lines southerly from the San Juan river, in and along the Gallegos Canon and the Chaco river, which are the only available gate-ways for a railroad southerly from the San Juan river.

23. The court finds that all of the testimony in this case was taken by a referee, and that no witness was sworn or examined before the court or the judge thereof or in his presence.

24. The court finds that the defendant company, ever since its incorporation in the year 1886 down to the present time, has been engaged in the maintenance and operation of lines of railroad in the Territory of New Mexico.

25. The court finds that on the preparty of Roy Sanderson about opposite mile post 489½, as shown on defendant's exhibit 270a, which exhibit is made a part of these findings, the river approaches so closely to plaintiff's surveyed line that the line is below high-water for a distance of between 100 and 300 feet, and that the trend of the river is directed against this point and would have a tendency to wash out any embankment there constructed, unless protected by very expensive substantial rip rap or wall.

26. The court finds that the cost of construction of the road of defendant, which has been in continuous operation since September 1905, not including the cost of rolling stock or other equipment, was the sum of \$830,853.80.

The foregoing findings are hereby made and certified by the Supreme Court of New Mexico, as a statement of the facts of the case, to be transmitted to the Supreme Court of the United States with the transcript of the proceedings and decree.

(Sgd.)

WILLIAM H. POPE,

Chief Justice.

December 22, 1911.

240 And Afterwards, on to wit, on the Forty-seventh day of the said regular term, the same being Friday, December 22nd A. D., 1911, the following among other proceedings were had and entered of record to wit:

No. 1237.

THE COLORADO & ARIZONA RAILROAD COMPANY OF NEW MEXICO,
Appellee,

vs.

THE DENVER AND RIO GRANDE RAILWAY COMPANY, Appellant.

Appeal from District Court.

Now comes the Hon. F. W. Clancy, Attorney for Appellants and moves the court to be granted an appeal from the judgment and decree of this Court to the Supreme Court of the United States, and the court being sufficiently advised in the premises grants said motion. It is therefore considered and adjudged by the court that the appellant do have and hereby is granted an appeal from the judgment and decree of this court to the Supreme Court of the United States.

And Heretofore, on to wit, on the twenty-sixth day of August A. D., 1911 there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an opinion by the court in the above entitled cause, which said opinion by the court was and is in the following words and figures to wit:

241 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1911.

No. 1237.

ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO,
Appellee,

vs.

DENVER & RIO GRANDE RAILROAD COMPANY, Appellant.

Appeal from District Court, Bernalillo County.

Statement of Facts.

May 25th, 1905, the plaintiff filed its bill of complaint against the defendant in the district court for San Juan County, alleging, in substance, that it, the plaintiff, was a corporation organized under the laws of New Mexico in October, 1904, authorized to construct, maintain and operate a railroad in said Territory from a point on the boundary line between New Mexico and Colorado near where Las Animas river crosses the same, through said county of San Juan and other counties of said Territory, to a point on the boundary line between it and the Territory of Arizona, near a point where the San Francisco river crosses it, a distance in all of about three hundred miles; that it had complied with the requirements of law, which are prerequisite to its entering upon the work and business for which it was incorporated, and had thereafter in said San Juan County, from

said point in the boundary line between New Mexico and Colorado south to the town of Farmington, in said county, a distance of about twenty-eight miles, completed its surveys for said portion of its proposed line of railroad, had fixed and determined its location, had marked and staked the same on the ground, had made for filing a map and profile thereof and was about to file the same as required by law, within a reasonable time, and that it had adopted such location. It further alleged that it had agreed with all but

242 one of the private owners of the land on which its location had been fixed, as aforesaid, upon the compensation to be paid for the taking and use of said land and right-of-way, and that instruments in writing embodying such agreements had been made and executed between it and said several land owners, and notice thereof filed for record in the office of the clerk of said county, that its said work of surveying and marking its location on the ground, preparing maps thereof, securing the right-of-way therefor, and other things of like nature had been done at great expense, that as a result the route and location it had thus laid out and adopted was the best possible one for the construction and operation of a railroad between Farmington and the point in the northern boundary line of the Territory from which it proposed to construct a railroad as above stated.

The plaintiff further averred that the defendant had full actual knowledge of all its, the plaintiff's, doings in the premises, as above set forth, including the agreements made with land owners, and that long after such proceedings by the plaintiff the defendant undertook and began the construction of a parallel line of railroad from a point near that to which the plaintiff's said location extends in the northern boundary line of New Mexico to said town of Farmington, and that, without necessity and wrongfully, it has entered upon the plaintiff's said location and sought to destroy its usefulness for the plaintiff, by staking out a location for its own railroad upon portions of the plaintiff's said location; that under the pretense of laying out necessary crossings over the plaintiff's said location it has, although each end of its own proposed location is on the same side of and near to the plaintiff's location, laid out its own proposed route to cross that of the plaintiff no less than eight times in said distance of about twenty-eight miles, and that such proposed crossings are not

243 made at, or nearly at, right angles with the plaintiff's said location, but in some instances extend along it and occupy as much as a thousand feet of its length, and besides that defendant proposes to make such pretended crossing at grade substantially different from those established at such points for the plaintiff's said location; all of which plaintiff says is done and threatened for the purpose, and, if permitted, will have the effect of substantially depriving the plaintiff of its said location and rendering the same wholly useless as a route for the construction and practical operation of a railroad.

It was also alleged that, as one of the means to be employed by the defendant to deprive the plaintiff of its location, the defendant purposed and threatened to institute condemnation proceedings to secure a right-of-way and location for itself including portions of

the plaintiff's said location, and in such proceedings to ignore the plaintiff's rights and act without notice to the plaintiff, and only against the owners of the land on which the plaintiff's location was laid out.

The plaintiff concluded with the usual allegations of the need of equitable relief, and with a prayer that the defendant be enjoined from continuing its alleged acts of encroachment.

The defendant demurred to the complaint on the ground that facts were not stated sufficient to constitute a cause of action against the defendant for the relief prayed for, or any relief whatever. The demurrer was sustained by the district court and final judgment entered dismissing the complaint, with costs to the defendant. Appeal was taken therefrom to this court.

In this court the judgment of the lower court dismissing the complaint was reversed and the cause remanded, with instructions to reinstate the cause and overrule the demurrer. A. & C. R. R. Co. v. D. & R. G. R. R. Co., 13 N. M. 357. Answer was thereupon filed, which it will not be necessary to set out in detail, further than to say, that it puts in issue every material allegation of the complaint and in particular the good faith of the plaintiff in locating its alleged line, the character of that line with reference to whether it was the best line possible; the ability of the plaintiff to construct its proposed line of railroad; the adoption, in accordance with law, of the alleged line of plaintiff; the knowledge of, or notice to, defendant of the pre-existence of any definitely located line of plaintiff before the defendant located its line and began construction thereof, and the plaintiff's right to maintain this action in equity.

The court referred the issues, as so made up, to an Examiner, to take the proofs and report the same to the court. To this action of the court the defendant objected and excepted, but, upon this appeal, appears to have abandoned any question relative to the procedure of the court in so referring said cause. In due course the examiner's report, consisting of over two thousand pages of testimony and exhibits, was filed. Upon hearing before the court, some two hundred and seventy-three objections to the referee's report, including objections to the admission and rejection of testimony, were ruled upon by the court. After full hearing the court below made its findings of fact and conclusions of law in favor of the plaintiff, and the decree was entered in accordance with such findings. The terms of the decree are not material to a determination of the issues involved herein. The case is now before this court on appeal from said decree.

Opinion.

WRIGHT, J.:

Appellant assigns two hundred and seventeen grounds of error, but, as is usually the case where assignments are so numerous, a large majority of same are merely variations of the same general proposition.

Under the oral argument of this case counsel confined themselves

to a discussion of the assignment considered in the briefs filed herein. It will not be necessary, therefore, for us to notice in detail any of the assignments of error not so considered by counsel, as, under the well established practice of this court, assignments of error not considered in the briefs or upon oral argument will be deemed to have been abandoned.

Gregory v. Cassan, 15 N. M. 496.

Upon a former appeal of this case, A. & C. R. R. Co. v. D. & R. G. R. R. Co., 13 N. M. 357, this court, speaking through Mr. Justice Abbott, held that the facts well pleaded established a vested interest in the plaintiff sufficient to enable it to invoke the jurisdiction of a court of equity. This question having been disposed of upon the former appeal became and is the settled law of this case.

Dye v. Crary, 13 N. M. 439.

The cause is now before us upon the merits under the pleadings so determined to be sufficient upon the former appeal. With one exception, which will be considered separately, the appellant admits that the facts found by the court are sufficient to sustain the decree.

The first proposition advanced by the appellant is that appellee was never in possession of its alleged right-of-way and had nothing for the protection of which this suit could be brought. Counsel for the appellant contend that this court upon the former appeal declared, as the law of this case, that it was necessary for the appellee to prove actual physical possession of the right of way in controversy, at the time of the alleged unlawful intrusion by the appellant, in order to support its action in a court of equity.

A careful reading of the opinion fails to disclose any such holding. Upon the former appeal the question was upon the sufficiency of the complaint. In its complaint appellee alleged that it was the owner of the location surveyed and staked out by it upon the ground and in possession thereof and that such possession had been interfered with by wrongful acts on the part of the appellant and was jeopardized by the threatened continuance thereof.

In passing upon the sufficiency of such allegations, the court says: "The defendant further urges that the title to the portions of the plaintiff's alleged location now in question is by the complaint shown to be in dispute between the plaintiff and defendant, and that the former must therefore establish its title at law, before it can have the aid of a court of equity to protect it. We do not so interpret the complaint. We understand it to charge that the defendant having actual notice and knowledge of the plaintiff's interest and rights in the premises, is, unlawfully and without any claim of right, seeking to deprive it of them by a series of wrongful acts already begun and threatened to be continued to the point of the complete ouster, and dispossession of the plaintiff."

In the case of Sioux City & D. M. Ry. Co. v. Chicago M. & St. P. Ry. Co., 27 Fed. 770, a case practically on "all fours" with the case at bar, Judge Shiras said;

"There is but one controversy in the cause, and that is:—Which company has the prior, and therefore better right to the occupancy of the premises in dispute, for the purpose of constructing and operating its line of railway * * * It is certainly equitable that a company, which in good faith surveys and locates a line of railroad and pays the expense thereof, should have a prior claim for the right of way for at least a reasonable length of time. The company does not perfect its right to the use of the land, as against the owner thereof, until it has paid the damages, but, as against a railroad company, it may have a prior and better equity."

See also *Ry. Co. v. Alling*, 99 U. S. 463.

It appears therefore that proof of a prior and better right to the occupancy of the right-of-way in dispute is sufficient to make this action cognizable in equity.

Did the appellee have such prior, and therefore better, right to the occupancy or possession of the right-of-way in dispute? In other words, did the appellee have a valid prior location of the right-of-way in question?

It is admitted by all parties that to constitute a valid location of a proposed railroad, within this jurisdiction, there must be:

1st. A survey and actual staking of the proposed line upon the ground.

2nd. The adoption of such survey by the Board of Directors as its permanent line or right-of-way.

The evidence establishes, beyond any question, that the surveys were actually made, and the proposed line of railroad staked and marked upon the ground. The appellant contends, however, that the surveys, so made, were never adopted by the Board of Directors of the Arizona and Colorado Railroad Company of New Mexico, as required by law, and that therefore the appellee never had any title or rights in its alleged right-of-way which the appellant was bound to respect. Upon this question the court below made the following finding of fact:

"3rd. That immediately upon its organization as aforesaid the plaintiff company proceeded with the survey and location of a line of railroad down the said Animas Valley between the said points, and layed out, located and marked upon the ground by stakes set in the ground a line of railroad between the said points, to-wit, between the boundary line of the State of Colorado and the Territory of New Mexico, and the town of Farmington, in said Territory of New Mexico, and prior to the 1st day of January, 1905, adopted the said line so surveyed, located and marked upon the ground, as the line of the definite location of its railroad between said last mentioned points."

The printed record in this case is very voluminous, containing twenty-five hundred pages, and as we deem this the question upon which this case must turn for affirmances or reversal, it is necessary, at this point, to state briefly the testimony bearing thereon.

The plaintiff in the lower court, in support of its allegations,

offered in evidence the records of the meetings of its Board of Directors, showing the adoption by resolution of various portions of its surveyed lines in San Juan County. It also placed upon the witness stand a witness, McFarland, the engineer in charge of its survey parties and who actually surveyed and staked out the right-of-way in question. The witness McFarland testified, without objection, that certain maps covering a surveyed line from the Colorado state line south along the valley of the Animas River to and through the town of Farmington, represented the right-of-way in question as surveyed, and adopted by its Board of Directors. It was also in evidence that there were numerous surveys made at about this time in San Juan County, by the appellee, for the purpose of determining the best possible line between Durango in the state of Colorado, and Farmington, New Mexico, and from thence south to the Arizona line, connecting with the lines of the appellee in Arizona. In at least two of these surveys, the engineer's station numbers began at zero in Colorado, running thence south, with consecutive numbers. It also appears that there were other engineer's station numbers commencing at O and running in consecutive order, from the south toward the town of Farmington. An examination of the resolutions from the minutes of the Board of Directors, introduced in evidence, discloses that the surveys were not adopted as a permanent line, as a whole, but that there were various resolutions covering different portions of the surveyed lines. In none of the resolutions does there appear any direct reference to any particular engineer's map. The entire distance from the Colorado state line south along the Animas river to and through the Town of Farmington, being the right-of-way in dispute, is about twenty-eight miles. No question is raised as to the adoption by the plaintiff company of the first fifteen odd miles from the state line of Colorado south, to and through the town of Aztec. This eliminates from the discussion two of the points of conflict, described and referred to in the testimony as the Whitney and McEwen Crossings.

Taking the various resolutions offered in evidence, together with the maps also in evidence we find, using the engineer's station numbers as guides, that these numbers might be applied to different locations and are not absolutely limited to that portion of the survey between the towns of Aztec and Farmington, in dispute of this suit. Mr. McFarland, however, testified, referring to the maps (mentioned above), that such maps indicated and described the right-of-way as surveyed and adopted. The witness Mc-249½ Connell also identified the lines described by McFarland as the survey adopted by the plaintiff company. Mr. McConnell also testified that after the line was adopted, he was employed to secure rights-of-way, and was furnished with maps and profiles showing the adopted line; such line being the same line testified to by the witness McFarland. All of these things occurred prior to the time that the defendant company took possession of any of those portions of the right-of-way in dispute in this suit.

Counsel for the appellant argues that there is no resolution showing the adoption of that portion of the survey between the towns of

Aztec and Farmington described as the "Revised Survey," and that the appellee, in offering the testimony of the witnesses McFarland and McConnell, was attempting to prove, by oral testimony, acts of the Board of Directors, which, by law are required to be kept in writing and as part of the records of the corporation. Counsel for appellant and counsel for appellee entered into a lengthy discussion of this question. Counsel for appellee cites the case of *U. S. Bank v. Dandridge*, 12 Wheat, 64. Counsel for appellant cites numerous cases, contending that where the statute requires the keeping of written records of directors' proceedings, (as is the case in New Mexico, Sec. 2832, C. L. of 1897,) oral evidence of corporate acts not so recorded is admissible against the corporation but ought not to be admitted on behalf of the corporation against the interests of others. While a consideration of this question might be very interesting, we do not find it necessary to a determination of the issues of this case to determine whether the evidence offered by appellee was an effort to establish corporate acts by parole or not, nor do we think it necessary to determine whether the resolutions of adoption offered in evidence by the appellee, as a matter of fact, do include all of the line so surveyed, located and marked upon the
 250 ground between the State line of Colorado and the Town of Farmington.

From a careful examination of the testimony it appears conclusively that the resolutions of the Board of Directors show the adoption of all of the right-of-way except, possibly, that portion near the Town of Aztec, referred to in the evidence and briefs as the "Revised Survey." This portion of the right-of-way includes "Young's Crossing," one of the disputed tracts, and the one of which appellant particularly complains as never having been adopted by the appellee as a part of its permanent right-of-way. It further appears, from the testimony and the findings, as to this particular tract, that the appellee was the owner of same, by direct purchase, prior to the institution of this suit, and prior to any trespass thereon by the appellant. No legal steps whatever were taken by the appellant to gain possession of this particular tract until after the institution of the case at bar, and it further affirmatively appears from the testimony and findings, that, at the time of the threatened trespass, the appellant company had not complied with any of the requirements of the territorial statutes as to the adoption of its line. The appellee was the actual owner of the land known as "Young's Crossing" and until the appellant had paid for, or condemned the said appellant had no rights therein whatever, and the appellee could protect its rights to the same regardless of whether this particular piece of right-of-way had been actually adopted as a permanent location by specific resolution, or not. The appellant, having no rights in that portion of the right-of-way known as "Young's Crossing," it becomes wholly immaterial, for the purposes of this discussion, to determine whether the court's finding of fact that,
 251 "prior to the first day of January, 1905, (the appellee) adopted the said line so surveyed, located and marked upon the ground as the line of the definite location of its railroad between said last mentioned points,"

Finding of Fact. No. 3 (Quoted *supra*) is supported by the testimony in so far as it refers to "Young's Crossing."

The next proposition urged by appellant is, that the appellee's line, as located, is not the best obtainable line. Joined with this proposition, is the contention that appellee, at small expense, can get a better line than the one claimed in this action, and that by reason of such facts, appellee ought not to maintain this action in equity, having a complete remedy at law in damages. A great mass of testimony was introduced bearing upon these questions. Witnesses for the appellee testified that the line, as surveyed and adopted by appellee, in view of all the surrounding circumstances and conditions, was a practical line and the best that could be obtained. Witnesses for the appellant testified to the contrary. Upon such conflicting testimony the court made definite and specific findings of fact in favor of the appellee. Under such a state of the record, this court will not inquire further.

Appellant further contends that appellee should not succeed for the reason that it is apparent from the testimony that interference by the appellant with the line claimed by appellee, could not be avoided; also that the allegations of good faith and ability on the part of the appellee to construct a railroad upon the right-of-way claimed, are not sustained by the testimony, and again that the appellee ought not to succeed because appellee was guilty of laches. With reference to each of such contentions, the court specifically found against the appellant, and with reference to the interference with the right-of-way of the appellee, the court specifically found that such interference by the appellant was willful and deliberate. A sufficient answer is that each finding is based upon ample evidence to sustain the same.

Appellant also contends, even admitting that appellee had some rights to the right-of-way claimed, that appellant had no notice of appellee's claims, either actual or constructive. It appears from the brief of counsel for appellant, that appellant's main contention as to the lack of notice is based upon the fact that the trial court admitted certain notices and options, which were recorded in the office of the Probate Clerk of San Juan County, which said notices and options were not acknowledged in form to be entitled to record and hence had no evidentiary value as records. Eliminating entirely from the evidence all such disputed evidence, an examination of the records discloses that there was ample evidence, of actual notice to warrant the trial court in making the finding that the appellant had actual knowledge. It follows that the question of constructive notice is therefore immaterial.

The final contention advanced by appellant is, that an examination of the record will show that the rulings by the court below upon evidence were such as to require the reversal of the judgment. At the outset, counsel concedes, as a general proposition in this jurisdiction, that erroneous rulings of a court as to the admissibility of evidence in a case tried by the court, without a jury, are not necessarily sufficient to call for a vacation of the judgment of the court below. Citing *Lynch v. Grayson*, 5 N. M., 488. Counsel con-

tend, however, that such rulings, when properly objected to and embodied in an assignment of errors, may be considered by the appellant court as indicating the condition of the judicial mind as to the case, and counsel insist that the rulings in this case indicate such a state of mind upon the part of the trial court as to impair confidence in the soundness of the conclusions reached by the court.

We have examined the record and the rulings of the court upon the objections to the Referee's report, and while we may not agree with the trial judge as to all of the rulings so made, yet we find substantial, competent evidence to sustain each and every one of the findings made by the trial judge, and nothing in the rulings of the trial judge which indicates, in the least degree, that the trial judge was not absolutely fair and impartial in all of his rulings.

There being no error in the record, the judgment of the lower court is affirmed.

E. R. WRIGHT,
Associate Justice.

We concur:

WILLIAM H. POPE, *C. J.*
FRANK W. PARKER, *A. J.*
MERRITT C. MECHEM, *A. J.*
CLARENCE J. ROBERTS, *A. J.*

McFie, A. J., having heard the case in the court below, upon demurrer, did not participate, and Abbott, A. J., having tried the case in the court below, did not participate.

254 In the Supreme Court of New Mexico.

ARIZONA & COLORADO RAILROAD COMPANY

vs.

DENVER & RIO GRANDE RAILROAD COMPANY, Appellant.

To the Clerk of said Supreme Court:

In making up the transcript of record in this cause, you will make the record as follows:

You will include so much of the transcript of record of proceedings in the district courts as contains the following:

Bill of complaint.

Injunction bond.

Order granting injunction.

Injunction.

Summons.

Demurrer to bill of complaint.

Prayer for appeal and appeal bond.

Mandate from Supreme Court of New Mexico.

Opinion of Supreme Court of New Mexico on first appeal.

Answer.

Reply.

Notice of application for reference.
 Motion and affidavits for change of venue.
 Docket entries in San Juan County court.
 Judgment on demurrer.
 Order granting appeal and fixing bond.
 Judgment on mandate from Supreme Court.
 Order changing venue to Bernalillo County.
 Certificate of Clerk Berger.
 255 Application for appointment of examiner or referee.
 Order appointing examiner.
 Report of examiner.
 Objection to report.
 Findings of court and conclusions of law.
 Findings and conclusions of law asked by defendant.
 Order refusing findings asked by defendant.
 Final decree.
 Motion to fix bond and grant appeal.
 Order granting appeal and supersedeas.
 Supersedeas bond.
 Order extending time to file record.
 Order as to referee's compensation.
 Order as to exhibit 27.
 Certificate of Clerk Venable.
 You will further include in said record the following:
 Assignment of Errors filed in this court.
 Record entries in this court to and including final decree.
 Motion for rehearing.
 Order denying same.
 Adoption of findings of court below.
 Adoption of additional findings.
 Order granting appeal.
 Opinion of court.
 Defendant's exhibits 270 and 270a, plaintiff's exhibits 35 and 36,
 and defendant's exhibits 3, 3a, and 2, which are referred to in the
 additional findings and made a part thereof.

FRANK W. CLANCY,
Counsel for Appellant.

I hereby, on behalf of plaintiff and appellee, acknowledge service
 of the foregoing præcipe, and waive time for making any
 256 additions or amendments thereto.

T. B. CATRON,
 CATRON & CATRON,
Attorney for Appellee.

January 13, 1912.

257 STATE OF NEW MEXICO,
Supreme Court, ss:

I, Jose D. Sena, Clerk of the Supreme Court of the State of New
 Mexico, do hereby certify that the above and foregoing two hundred

and fifty-three (253) pages contain a full, true and correct transcript of the record and proceedings, pleadings and opinion in the above entitled cause, which is hereby transmitted to the Supreme Court of the United States in accordance with an appeal herein granted by the supreme court of the Territory of New Mexico.

Witness my hand and the seal of the Supreme Court of the Territory of New Mexico, this the 12th day of January, A. D., 1912.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,

Clerk Supreme Court, State of N. M.

258 In the Supreme Court of the United States, October Term, 1912.

No. 545.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, Appellant,
vs.
ARIZONA AND COLORADO RAILROAD COMPANY OF NEW MEXICO,
Appellee.

Notice.

To the Honorable James H. McKenney, Clerk of the Supreme — of the United States, Washington, D. C.; Catron and Catron, Ritter and Buchanan, and H. B. Ferguson, Attorneys for Appellee, Arizona and Colorado Railroad Company of New Mexico.

SIRS: Please take notice that the annexed is the assignment of errors on which the appellant herein intends to rely upon the appeal taken herein from the Supreme Court of the Territory of New Mexico, to the Supreme Court of the United States, and that appellant thinks it necessary for the consideration thereof to print the transcript of the record herein as transmitted by the Clerk of the Supreme Court of the Territory of New Mexico to the Supreme Court of the United States.

Dated this 20th day of May, 1912.

JOEL F. VAILE,

E. M. CLARK,

R. G. LUCAS,

*Attorneys for Appellant, The Denver
and Rio Grande Railroad Company.*

259 In the Supreme Court of the United States, October Term, 1917.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, Appellant,
vs.
ARIZONA AND COLORADO RAILROAD COMPANY OF NEW MEXICO,
Appellee.

Assignment of Errors.

Comes now the appellant in the above entitled cause, The Denver and Rio Grande Railroad Company, and files the following assignments of error upon which it will rely upon its appeal from the final judgment or decree of the Supreme Court of the Territory of New Mexico, in the cause entitled "Arizona and Colorado Railroad Company of New Mexico vs. Denver & Rio Grande Railroad Company," and in connection with this appeal, this appellant respectfully submits that in the record, proceedings, decision and final judgment or decree in said cause, the Supreme Court of the Territory of New Mexico erred to the grievous injury and wrong of this appellant, and against its rights in the particulars hereinafter set forth, and this appellant avers that in the record, proceedings, decision and final judgment or decree of the Supreme Court of the Territory of New Mexico, the court below, whence this cause came into this court, there is manifest error in this, to-wit:

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I.

The Supreme Court of the Territory of New Mexico erred in affirming the judgment of the District Court of Bernalillo County, New Mexico, in said cause.

II.

The Supreme Court of the Territory of New Mexico erred in not reversing the judgment of the District Court of Bernalillo County, New Mexico, in said cause.

III.

The Supreme Court of the Territory of New Mexico erred in not reversing, and erred in affirming that portion of the decree of the District Court of Bernalillo County, New Mexico, wherein and whereby it is considered, ordered, adjudged and decreed that the issues herein be and they are found with the plaintiff; and that the plaintiff is entitled to the relief prayed herein, subject only to the limitation or condition that it shall not be authorized to oust the defendant from the possession of that portion of the line in controversy now occupied by the defendant company in the actual operation of its line of railway until such time as plaintiff shall have constructed at least twenty miles of railroad, substantially along the

line adopted by it as set forth and described in its complaint, and shall actually enter upon the grading of its adopted line of railroad between Farmington, New Mexico, and Durango, Colorado, along said line; and provided that the plaintiff shall have complied with all conditions precedent to such construction, still to be performed by it in order to conform to the provisions of the law of New Mexico relating to the laying out and construction of railroads.

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IV.

The Supreme Court of the Territory of New Mexico erred in not reversing, and erred in affirming that portion of the decree of the District Court of Bernalillo County, New Mexico, wherein and whereby it is considered ordered, adjudged and decreed by the court that the plaintiff, The Arizona and Colorado Railroad Company of New Mexico, do have and recover of and from the defendant, The Denver and Rio Grande Railroad Company, the possession of the said lines and railroad right of way of the said plaintiff, by it adopted, surveyed and located, as described in the complaint herein, and as set forth in the maps and profiles filed in the office of the Secretary of New Mexico, and in the office of the Probate Clerk and ex-Officio Recorder of the County of San Juan, in the Territory of New Mexico, and that the said defendant do vacate and surrender to plaintiff the possession thereof, when the said plaintiff shall have constructed at least twenty miles of railroad substantially complete for use, within the Territory of New Mexico along the line adopted by it as set forth and described in its complaint, and shall actually enter upon the grading of its line of railroad between Farmington, New Mexico, and Durango, Colorado, along the said line adopted by plaintiff and in the said complaint described and provided that the plaintiff shall have complied with all conditions precedent to such construction, still to be performed by it in order to conform to the provisions of the laws of New Mexico relating to the laying out and construction of railroads.

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V.

The Supreme Court of the Territory of New Mexico erred in not reversing, and erred in affirming that portion of the decree of the District Court of Bernalillo County, New Mexico, wherein and whereby it is further considered ordered, adjudged and decreed, that the rights of plaintiff to enter upon said right of way, and to take, grade and possess the same as hereinabove decreed, and the duty of defendant to vacate and surrender to plaintiff the possession thereof, shall be limited in time to the space and period ending five years from the date of this decree.

VI.

The Supreme Court of the Territory of New Mexico erred in not reversing, and erred in affirming that portion of the decree of the District Court of Bernalillo County, New Mexico, wherein and

whereby it is further considered ordered, adjudged and decreed that the said defendant be and it is restrained and enjoined henceforth from prosecuting further any condemnation suits or actions now pending or which might be hereafter by defendant instituted, in so far as such suits or actions may in any wise affect the rights and interests of the plaintiff company in and to the said line so located and adopted by it, and hereinabove mentioned.

VII.

The Supreme Court of the Territory of New Mexico erred in not reversing, and erred in affirming that portion of the decree of the District Court of Bernalillo County, New Mexico, wherein and whereby it is further considered ordered, adjudged and decreed that the said defendant be and it hereby is restrained and enjoined henceforth from any further or other entry or trespass upon the said line of road so adopted and located by said plaintiff, and hereinabove mentioned except only in so far as it is by this decree expressly permitted to continue the operation of its road as now constructed until such time as in this decree above provided.

VIII.

The Supreme Court of the Territory of New Mexico erred in not reversing, and erred in affirming that portion of the decree of the District Court of Bernalillo County, New Mexico, wherein and whereby it is further considered, ordered, adjudged and decreed that the plaintiff do further have and recover of and from defendant its costs herein to be taxed.

IX.

The Supreme Court of the Territory of New Mexico erred in holding that the special findings of fact made by the District Court of Bernalillo County, New Mexico, was sufficient to sustain the judgment or the decree entered in said District Court against this appellant, The Denver and Rio Grande Railroad Company.

X.

The Supreme Court of the Territory of New Mexico erred in holding that the statement of facts by it adopted, found and made in this cause was sufficient to support, and erred in not holding that such statement of facts did not justify the judgment or decree entered herein in the District Court of Bernalillo County, New Mexico.

XI.

The Supreme Court of the Territory of New Mexico erred in rendering judgment in this cause in said Supreme Court in favor of appellee and against appellant herein, and erred in not making and entering a judgment or decree in favor of appellant and against appellee herein.

XII.

The Supreme Court of the Territory of New Mexico erred in that the statement of facts by it adopted, found and made in this cause is insufficient to support and does not justify the final judgment or decree entered herein by said Supreme Court, and said Supreme Court erred in entering or making said final judgment or decree herein upon such statement of facts against this appellant and in favor of appellee, and erred in not making and entering upon such statement of facts a judgment or decree in favor of appellant and against appellee.

XIII.

The Supreme Court of the Territory of New Mexico erred in holding that upon the facts found by the District Court of Bernalillo County, New Mexico, and the facts found by said Supreme Court, and the statement of facts adopted, found or made by said Supreme Court, appellee was entitled to the relief or to the judgment awarded appellee, and erred in not entering and making upon such facts and statement of facts a judgment or decree in favor of appellant.

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XIV.

The Supreme Court of the Territory of New Mexico erred in not holding upon the statement of facts adopted, found or made by it that appellee herein was never in possession of the right of way in dispute herein, and had nothing for the protection of which this suit or action could be brought or maintained by appellee herein.

XV.

The Supreme Court of the Territory of New Mexico erred in holding upon the statement of facts by it adopted, found or made that appellee herein had any right prior or better than that of the appellant herein to the occupancy and possession of the right of way in dispute herein.

XVI.

The Supreme Court of the Territory of New Mexico erred in holding upon the statement of facts adopted, found or made by it that appellee herein was ever in possession of the right of way in dispute herein, or that appellee had anything for the protection of which this suit could be brought or maintained by appellee herein.

XVII.

The Supreme Court of the Territory of New Mexico erred in not holding upon the statement of facts by it adopted, found or made that appellee herein did not have any right prior or better than that of appellant herein to the occupation and possession of the right of way in dispute herein.

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XVIII.

The Supreme Court of the Territory of New Mexico erred in holding upon the statement of facts by it adopted, found or made that appellee herein had acted in good faith or was entitled to any relief herein.

XIX.

The Supreme Court of the Territory of New Mexico erred in not holding upon the statement of facts by it adopted, found or made that appellee herein had not acted in good faith and was not entitled to any relief herein.

XX.

The Supreme Court of the Territory of New Mexico erred in holding upon the statement of facts by it adopted, found or made that appellee herein was not guilty of laches herein, and was entitled to any relief herein.

XXI.

The Supreme Court of the Territory of New Mexico erred in not holding upon the statement of facts by it adopted, found or made herein that appellee herein was guilty of laches herein, and was not entitled to any relief herein.

XXII.

The Supreme Court of the Territory of New Mexico erred in holding upon the statement of facts by it adopted, found or made herein that any interference by appellant with the line claimed by appellee herein could have been avoided.

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XXIII.

The Supreme Court of the Territory of New Mexico erred in not holding upon the statement of facts by it adopted, found or made herein that any interference by appellant with the line claimed by appellee herein could not have been avoided.

XXIV.

The Supreme Court of the Territory of New Mexico erred in holding upon the statement of facts by it adopted, found or made herein that the interference by appellant with the line claimed by appellee herein, as shown by the facts and record herein, could have been avoided.

XXV.

The Supreme Court of the Territory of New Mexico erred in not holding upon the statement of facts by it adopted, found or made herein that such interference by appellant with the line claimed by appellee herein, as shown by the facts and record herein, could not be avoided by appellant herein.

XXVI.

The Supreme Court of the Territory of New Mexico erred in holding upon the statement of facts by it adopted, found or made herein that the appellee's line of right of way, as located, is the best obtainable line.

XXVII.

The Supreme Court of the Territory of New Mexico erred in not holding upon the statement of facts by it adopted, found or made herein that appellee's line of right of way, as located, is not the best obtainable line.

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XXVIII.

The Supreme Court of the Territory of New Mexico erred in holding upon the statement of facts by it adopted, found or made herein that appellee could not at small expense get a better line than the one by it claimed in this action, and that therefore appellee ought to have and maintain this action in equity and did not have a complete and adequate remedy at law in damages.

XXIX.

The Supreme Court of the Territory of New Mexico erred in not holding upon the statement of facts by it adopted, found or made herein that appellee could at small expense get a better line than the one by it claimed in this action, and that therefore appellee ought not to have or maintain this action in equity as appellee had a full, fair, complete and adequate remedy at law in damages.

XXX.

The Supreme Court of the Territory of New Mexico erred in holding upon the statement of facts by it adopted, found or made herein that appellee could not at small expense get as good and sufficient line as the one claimed by it in this action, and that therefore appellee ought not to have or maintain this action in equity and did not have a complete and adequate remedy at law in damages.

XXXI.

The Supreme Court of the Territory of New Mexico erred in not holding upon the statement of facts by it adopted, found or made herein that appellee could at small expense get as good and sufficient line as the one claimed by — in this action, and that therefore appellee ought not to have or maintain this action in equity as appellee had a full, fair, complete and adequate remedy at law in damages.

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XXXII.

The Supreme Court of the Territory of New Mexico erred in holding upon the statement of facts by it adopted, found or made that

appellee had ever adopted the surveyed line of right of way to protect which this action was brought.

XXXIII.

The Supreme Court of the Territory of New Mexico erred in not holding upon the statement of facts by it adopted, found or made that appellee had never adopted the surveyed line of right of way to protect which this action was brought.

XXXIV.

The Supreme Court of the Territory of New Mexico erred in holding upon the statement of facts by it adopted, found or made that any or any sufficient notice to appellant of appellee's location or adoption of such line of right of way in dispute herein was shown.

XXXV.

The Supreme Court of the Territory of New Mexico erred in not holding upon the statement of facts by it adopted, found or made herein that no notice or no sufficient notice to appellant of appellee's location or adoption of such line of right of way in dispute herein was shown.

XXXVI.

The Supreme Court of the Territory of New Mexico erred in affirming the judgment of the District Court of Bernalillo County, New Mexico, and erred in not reversing such judgment of said District Court, and erred in rendering judgment in said Supreme Court against appellant and in favor of appellee herein, and erred in not entering judgment in said Supreme Court in favor of appellant and against appellee herein, in that the findings of fact made by the District Court of Bernalillo County, New Mexico, which were adopted by the Supreme Court of New Mexico, as findings for use upon this appeal, are insufficient to support the judgment against appellant, because they are defective, and untrue as to important and material matters, as shown by the additional and specific findings made by said Supreme Court, this assignment of error being subdivided as follows:

(a) While the seventh finding made by the District Court and adopted by the Supreme Court, among other things, states that plaintiff's surveyed line was and is the best line and the best line obtainable between the Colorado State line and the town of Farmington, yet the additional and specific findings made by the Supreme Court numbered 3 to 7, both inclusive, and 25, distinctly point out that plaintiff's said line is not only the best line or the best line obtainable, but is in many parts a positively bad line, and much inferior to the line constructed by defendant over substantially the same ground, and that plaintiff could obtain a much better line, the added expense of which would not be great and could be easily ascertained and measured in money.

271 (b) While the third finding made by the District Court and adopted by the Supreme Court declares that the plaintiff, prior to the first day of January, 1905, adopted its surveyed line between the boundary line of the State of Colorado and the town of Farmington, New Mexico, and while repeated references are made in many of the others of said findings to the adoption of said line by plaintiff, as in the fourth, fifth, sixth, seventh, tenth, eleventh, thirteenth, fourteenth, seventeenth, nineteenth and twenty-second, of said findings, yet it is distinctly made to appear by the ninth to the fourteenth of the additional and more specific findings made by said Supreme Court, that said line to the extent of more than ten miles out of about twenty-seven miles in question, has never been adopted by plaintiff as required by law.

(c) While the fifth finding of fact made by the District Court and adopted by the Supreme Court declares that on October 27, 1904, plaintiff filed in the United States Land Office at Santa Fe, New Mexico, its map of that portion of its line north of the town of Farmington, which line — between a point north of and near the town of Aztec and the said boundary between Colorado and New Mexico, yet the tenth and eleventh of the additional and specific findings made by said Supreme Court show that said fifth finding is not true, as will particularly appear by reference to defendant's Exhibit 3-A, which is made a part of said findings.

(d) While the sixth finding of fact made by the District Court and adopted by the Supreme Court sets out that the plaintiff agreed with substantially all the owners of lands crossed by its line

272 as to the compensation to be paid for the taking and occupation of such line for the use of plaintiff, and secured from practically all of such owners options and agreements in writing authorizing it to enter upon and take such land, with but two exceptions, yet the seventeenth of the additional and specific findings made by said Supreme Court shows that said sixth finding is defective and as misleading as though it were directly untrue.

(e) While the thirteenth finding of fact made by the District Court and adopted by said Supreme Court declares that the plaintiff and its allied corporations appear to have proceeded in good faith and with due diligence in the survey, location and selection of the said line of railroad, yet the thirteenth, fourteenth, fifteenth, sixteenth, nineteenth and twentieth of the additional and specific findings made by said Supreme Court show that said plaintiff has not proceeded in good faith and with due diligence.

(f) While the nineteenth finding of fact made by the District Court and adopted by said Supreme Court declares, among other things, that the survey of that portion of appellant's line south of the Bouseman crossing and between that place and the town of Farmington, was made by the same engineer who had theretofore, while in the service of the plaintiff, surveyed and located plaintiff's line between said points, yet the eighteenth of the additional and specific findings made by said Supreme Court shows that in this particular said nineteenth finding is wholly untrue.

273 (g) While the twenty-sixth finding of fact made by the District Court and adopted by said Supreme Court declares

that the valley of the Animas River is a comparatively wide, level valley, with room for the construction of two or more railroads without interference with each other, and that no necessity or sufficient reason existed for any crossing of plaintiff's line by the defendant company, or any interference therewith, yet the said additional and specific findings made by said Supreme Court, taken in connection with the map exhibits made parts of said findings, show that plaintiff's line was so located as to make it impossible for another railroad to be located and constructed without interference therewith.

XXXVII.

The Supreme Court of the Territory of New Mexico erred in affirming the judgment of the District Court of Bernalillo County, New Mexico, and erred in not reversing such judgment of said District Court, and erred in rendering judgment in said Supreme Court against appellant and in favor of appellee herein, and erred in not entering judgment in said Supreme Court in favor of appellant and against appellee herein, in that while the seventh finding made by the District Court and adopted by the Supreme Court, among other things, states that plaintiff's surveyed line was and is the best line and the best line obtainable between the Colorado State line and the town of Farmington, yet the additional and specific findings made by the Supreme Court numbered 3 to 7, both inclusive, and 25, distinctly point out that plaintiff's said line is not only not the best line or the best line obtainable, but is in many parts a positively
274 bad line, and much inferior to the line constructed by defendant over substantially the same ground, and that plaintiff could obtain a much better line, the added expense of which would not be great and could be easily ascertained and measured in money.

XXXIX.

The Supreme Court of the Territory of New Mexico erred in affirming the judgment of the District Court of Bernalillo County, New Mexico, and erred in not reversing such judgment of said District Court, and erred in rendering judgment in said Supreme Court against appellant and in favor of appellee herein, and erred in not entering judgment in said Supreme Court in favor of appellant and against appellee herein, in that while the third finding made by the District Court and adopted by the Supreme Court declares that the plaintiff, prior to the first day of January, 1905, adopted its surveyed line between the boundary line of the State of Colorado and the town of Farmington, New Mexico, and while repeated references are made in many of the others of said findings to the adoption of said line by plaintiff, as in the fourth, fifth, sixth, seventh, tenth, eleventh, thirteenth, fourteenth, seventeenth, nineteenth and twenty-second of said findings, yet it is distinctly made to appear by the ninth to the fourteenth of the additional and more specific findings made by said Supreme Court, that said line to the extent of more than ten miles out of about twenty-seven miles in question, has never been adopted by plaintiff as required by law.

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XL.

The Supreme Court of the Territory of New Mexico erred in affirming the judgment of the District Court of Bernalillo County, New Mexico, and erred in not reversing such judgment of said District Court, and erred in rendering judgment in said Supreme Court against appellant and in favor of appellee herein, and erred in not entering judgment in said Supreme Court in favor of appellant and against appellee herein, in that while the fifth finding of fact made by the District Court and adopted by the Supreme Court declares that on October 27, 1904, plaintiff filed in the United States Land Office at Santa Fe, New Mexico, its map of that portion of its line north of the town of Farmington, which lies between a point north of and near the town of Aztec, and the said boundary between Colorado and New Mexico, yet the tenth and eleventh of the additional and specific findings made by said Supreme Court show that said fifth finding is not true, as will particularly appear by reference to defendant Exhibit 3-A, which is made a part of said finding.

XLI.

The Supreme Court of the Territory of New Mexico erred in affirming the judgment of the District Court of Bernalillo County, New Mexico, and erred in not reversing such judgment of said District Court, and erred in rendering judgment in said Supreme Court against appellant and in favor of appellee herein, and erred in not entering judgment in said Supreme Court in favor of appellant and against appellee herein, in that while the sixth finding of fact made by the District Court and adopted by said Supreme Court sets out that the plaintiff agreed with substantially all the owners of lands crossed by its line as to the compensation to be paid for the taking and occupation of such line for the use of plaintiff, and secured from practically all of such owners options and agreements in writing authorizing it to enter upon and take such land, with but two exceptions, yet the seventeenth of the additional and specific findings made by said Supreme Court shows that said sixth finding is defective and as misleading as though it were directly untrue.

XLII.

The Supreme Court of the Territory of New Mexico erred in affirming the judgment of the District Court of Bernalillo County, New Mexico, and erred in not reversing such judgment of said District Court, and erred in rendering judgment in said Supreme Court against appellant and in favor of appellee herein, and erred in not entering judgment in said Supreme Court in favor of appellant and against appellee herein, in that while the thirteenth finding of fact made by the District Court and adopted by said Supreme Court declares that the plaintiff and its allied corporations appear to have proceeded in good faith and with due diligence in the survey, location and selection of the said line of railroad, yet the

thirteenth, fourteenth, fifteenth, sixteenth, nineteenth and twentieth of the additional and specific findings made by said Supreme Court show that said plaintiff has not proceeded in good faith and with due diligence.

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XLIII.

The Supreme Court of the Territory of New Mexico erred in affirming the judgment of the District Court of Bernalillo County, New Mexico, and erred in not reversing such judgment of said District Court, and erred in rendering judgment in said Supreme Court against appellant and in favor of appellee herein, and erred in not entering judgment in said Supreme Court in favor of appellant and against appellee herein, in that while the nineteenth finding of fact made by the District Court and adopted by said Supreme Court declares, among other things, that the survey of that portion of appellant's line south of the Bousman crossing and between that place and the town of Farmington, was made by the same engineer who had theretofore, while in the service of the plaintiff, surveyed and located plaintiff's line between said points, yet the eighteenth of the additional and specific findings made by said Supreme Court shows that in this particular said nineteenth finding of fact is wholly untrue.

XLIV.

The Supreme Court of the Territory of New Mexico erred in affirming the judgment of the District Court of Bernalillo County, New Mexico, and erred in not reversing such judgment of said District Court, and erred in rendering judgment in said Supreme Court against appellant and in favor of appellee herein, and erred in not entering judgment in said Supreme Court in favor of appellant and against appellee herein, in that while the twenty-sixth finding of

278 fact made by the District Court and adopted by said Supreme Court declares that the valley of the Animas River is a comparatively wide, level valley, with room for the construction of two or more railroads without interference with each other, and that no necessity or sufficient reason existed for any crossing of plaintiff's line by the defendant company, or any interference therewith, yet the said additional and specific findings made by said Supreme Court, taken in connection with the map exhibits made parts of said findings, show that plaintiff's line was so located as to make it impossible for another railroad to be located and constructed without interference therewith.

XLV.

The Supreme Court of the Territory of New Mexico erred in affirming the judgment of the District Court of Bernalillo County, New Mexico, and erred in not reversing such judgment of said District Court, and erred in rendering judgment in said Supreme Court against appellant and in favor of appellee herein, and erred in not

entering judgment in said Supreme Court in favor of appellant and against appellee herein, in that there is no finding to sustain the material allegations of the bill of complaint as to the ability of plaintiff to construct and operate its line of railroad.

XLVI.

The Supreme Court of the Territory of New Mexico erred in affirming the judgment of the District Court of Bernalillo County.

New Mexico, and erred in not reversing such judgment of
279 said District Court, and erred in rendering judgment in said Supreme Court against appellant and in favor of appellee herein, and erred in not entering judgment in said Supreme Court in favor of appellant and against appellee herein, in that there is no finding that plaintiff has ever been in possession of plaintiff's alleged line and right of way to protect which this suit was brought.

XLVII.

The Supreme Court of the Territory of New Mexico erred in affirming the judgment of the District Court of Bernalillo County. New Mexico, and erred in not reversing such judgment of said District Court, and erred in rendering judgment in said Supreme Court against appellant and in favor of appellee herein, and erred in not entering judgment in said Supreme Court in favor of appellant and against appellee herein, in that the District Court erred in refusing to strike out oral evidence of adoption by plaintiff's board of directors of the line to protect which this suit was brought, and the Supreme Court erred in its twelfth additional and specific finding, when it declared that such adoption was shown by the oral statement of plaintiff's witness, such oral evidence being inadmissible.

XLVIII.

The Supreme Court of the Territory of New Mexico erred in affirming the judgment of the District Court of Bernalillo County. New Mexico, and erred in not reversing such judgment of said District Court, and erred in rendering judgment in said Supreme Court against appellant and in favor of appellee
280 herein, and erred in not entering judgment in said Supreme Court in favor of appellant and against appellee herein, in that it affirmatively appears from the additional and specific findings of fact made by said Supreme Court, that if the plaintiff is in any way injured or damaged by the location and construction of appellant's railroad, such injury and damage can be fully compensated in money, so that there is no question possible of irreparable injury calling for relief by way of injunction.

XLIX.

The Supreme Court of the Territory of New Mexico erred in stating in its opinion that a witness, McFarland, was the engineer

in charge of plaintiff's survey parties, who actually surveyed and staked out the right of way in question, as it appears by the court's eighteenth additional finding that there is no evidence whatever as to when or by whom plaintiff's line between the Bouseman crossing and the town of Farmington was located beyond the statement of one of plaintiff's witnesses that it was subsequently surveyed and that C. L. Mitton, locating engineer, started the line from a point on the Bouseman land to the town of Farmington after November 24, 1904.

L.

The Supreme Court of the Territory of New Mexico erred in the statement in its opinion that the witness McFarland testified without objection that certain maps covering a surveyed line from the Colorado state line south along the valley of the Animas River to and through the town of Farmington represented the right of way in question, as surveyed and adopted by plaintiff's board of directors, when it appears by the record, and by the twelfth additional finding of the said court that defendant made timely objection to the question propounded to the witness, and as soon as the witness McFarland made his statement about the maps, moved that it be stricken out.

LI.

The Supreme Court of the Territory of New Mexico erred in the view set out in its opinion that it appeared conclusively that the resolutions of the board of directors show the adoption of all of the right of way except that portion near the town of Aztec which includes the Young crossing, as this is inconsistent with the tenth, eleventh, twelfth and fourteenth additional findings, which plainly show that not only is there a portion of the line not covered by any order of the board of directors, between six and a half and seven miles in length upon which the Young crossing occurs, but that there is also a distance of about three and a half miles below the second point of divergence of plaintiff's lines which is not covered by any order of adoption by plaintiff's board of directors.

LII.

The Supreme Court of the Territory of New Mexico erred in the view set forth in its opinion that the question of the admissibility of oral evidence of corporate acts on behalf of the corporation against the interest of others, was not necessary to a determination of the issues of the case, nor whether the resolutions of adoption offered in evidence by the appellee included all of the line between Colorado and the town of Farmington, as that view is based upon the fact of ownership by plaintiff of the land at the Young crossing and ignores entirely any consideration of that portion of the line to protect which the suit was brought, from

the point of the second divergence of the two lines of plaintiff to the town of Farmington upon which occur the Bouseman crossing and a number of encroachments and interferences on the land of Sutherland, Ricketts and Miller, as plainly appears by the fourteenth additional finding of the court.

LIII.

The Supreme Court of the Territory of New Mexico erred in the view set forth in its opinion that appellee could protect its rights to the land at the Young crossing regardless of whether this particular piece of right of way had been actually adopted as a permanent location by specific resolution or not, because the appellee was the actual owner of the land at that place, when protection of land not covered by the adopted line of appellee was not within the issues of the case, nor covered by the allegations of the bill of complaint.

LIV.

The Supreme Court of the Territory of New Mexico erred in its statement in its opinion that finding of fact No. 3 of the
283 District Court which is quoted in the opinion, is supported by the testimony, so far as it refers to the Young crossing, which finding is to the effect that the plaintiff and appellee had adopted the line between Colorado and the town of Farmington prior to the first day of January, 1905, as it is shown by the court's additional findings eleven, twelve and thirteen, that the portion of the line upon which the Young crossing occurs was never adopted by the plaintiff's board of directors.

LV.

The Supreme Court of the Territory of New Mexico erred in its statement in its opinion that as to the tract of land at the Young crossing the appellee was owner of same by purchase prior to the institution of the suit, and that no legal steps whatever were taken by the appellant to gain possession of this particular tract until after the institution of the case at bar, when it appears by the thirteenth additional finding of the court that at the time of the execution of the deed from Edith Young conveying 6.59 acres on May 9, 1905, which was recorded on May 12, 1905, the day of the institution of this suit, a condemnation proceeding begun by defendant under the statute of New Mexico was pending against said Edith Young for the purpose of condemning a portion of the land embraced within the right of way described in said deed.

LVI.

The Supreme Court of the Territory of New Mexico erred in the view expressed in its opinion that as to whether the appellee's

284 line as located was the best obtainable line or not the court would not inquire because there was conflicting testimony in the court below and that court had made findings in favor of appellee, when said Supreme Court ought to have re-examined the testimony which was before the District Court and fully determined therefrom what was the fact, as none of the testimony had been taken before the court but was all taken by an Examiner, and such error is also affirmatively shown by the additional findings three, four, six and seven of said Supreme Court of New Mexico, which clearly point out not only that appellee's line was not the best line obtainable, but was a positively inferior and bad line.

LVII.

The Supreme Court of New Mexico erred in the statement in its opinion that there was a specific finding by the District Court as to the allegations of good faith and ability on the part of appellee to construct a railroad, and that such finding is based upon ample evidence to sustain the same, as will appear by an inspection of the findings of the District Court which contain nothing as to the ability of plaintiff and appellee to construct its road and by the court's additional finding sixteen, which negatives in effect any idea of good faith or intention and ability on the part of plaintiff and appellee to construct its proposed railroad line.

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LVIII.

The Supreme Court of the Territory of New Mexico erred in its statement that there was a specific finding by the District Court as to the contention that plaintiff and appellee ought not to succeed because it was guilty of laches, and that such finding was based upon ample evidence to sustain the same, when there was no such specific finding by the District Court and the additional findings sixteen, seventeen, nineteen and twenty clearly show unexplained and unexplainable laches on the part of plaintiff and appellee.

Wherefore, For these and other manifest errors appearing in the record, the appellant, The Denver and Rio Grande Railroad Company, prays this Honorable Court that the judgment and decree of the Supreme Court of the Territory of New Mexico be, in all things, reversed, vacated, set aside, annulled and held for naught, and that this cause be remanded to said Supreme Court of the Territory of New Mexico with directions to enter an order reversing, vacating and setting aside the judgment or decree of the District Court of Bernalillo County, New Mexico, in this cause, and restoring appellant to all things which it has lost by this action, and because of such judgment and decree, and dismissing this cause of action at the cost of the original plaintiff, the appellee; and further prays that appellant may have such other and further relief

as may be just and proper, to the end that justice may be done in the premises.

Dated this 20th day of May, 1912.

JOEL F. VAILE,
E. N. CLARK,
R. G. LUCAS,
Attorneys for Appellant.

(L-B 5-15-1912)

286 [Endorsed:] File No. 23,052. Supreme Court U. S. October Term, 1912. Term No. 545. The Denver & Rio Grande R. R. Co., Appellant, vs. The Arizona & Colorado R. R. Co. of New Mexico. Assignment of Errors. Filed June 11, 1912.

Endorsed on cover: File No. 23,052. New Mexico Territory Supreme Court. Term No. 545. The Denver & Rio Grande Railroad Company, appellant, vs. The Arizona & Colorado Railroad Company of New Mexico. Filed February 10th, 1912. File No. 23,052.

U. S. Supreme Court, 1913

FILED

DEC 1 1913

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1913, No. 168.

~~On writ of Habeas Corpus~~

THE DENVER AND RIO GRANDE RAILROAD
COMPANY,

Appellant,

v.

THE ARIZONA AND COLORADO RAILROAD
COMPANY OF NEW MEXICO,

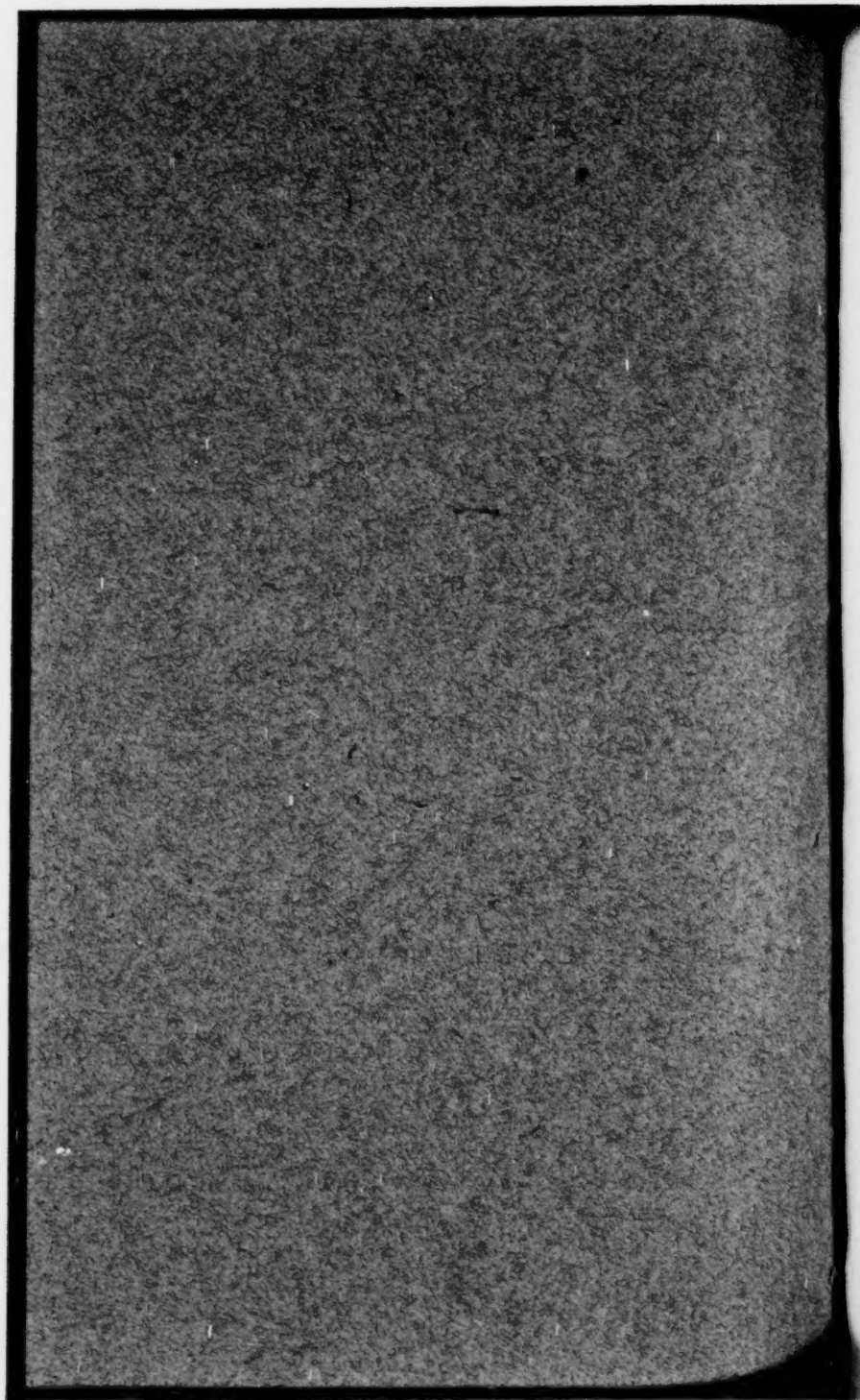
Appellee.

*Appeal from the Supreme Court of the Territory of
New Mexico.*

BRIEF AND ARGUMENT IN BEHALF OF AP-
PELLANT.

JOEL F. VAILE,
General Counsel of The Denver and
Rio Grande Railroad Company,
Appellant.

E. N. CLARK,
R. G. LUCAS,
Of Counsel.



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In the Supreme Court of the United States

OCTOBER TERM, 1913, No. 188.

OCTOBER TERM, 1912, No. 545.

THE DENVER AND RIO GRANDE RAILROAD
COMPANY,

Appellant,

v.

THE ARIZONA AND COLORADO RAILROAD
COMPANY OF NEW MEXICO,

Appellee.

*Appeal from the Supreme Court of the Territory of
New Mexico.*

BRIEF AND ARGUMENT IN BEHALF OF AP-
PELLANT.

This action was brought in the first instance on May 12, 1905, in the District Court of San Juan County, in the then Territory of New Mexico, by the appellee herein, as plaintiff, against the appellant herein, as defendant (2-16), to restrain an alleged trespass upon a railroad right of way claimed by appellee. A temporary injunction issued on May 13, 1905 (18-21) but was dissolved when a demurrer to the complaint was sustained and the case dismissed (22-23) on June 2,

1905. Thereupon appellee appealed to the Supreme Court of the Territory (23-25), which Court on March 5, 1906, reversed the judgment and remanded the record to the District Court with instructions to reinstate the action and proceed in accordance with the views expressed in the opinion of the Court (24-27; 13 N. M. 345). Appellant then filed its answer and appellee its reply (30-67). At the instance of appellee the venue was changed to Bernalillo County (68-69-75). Thereafter, over appellant's objection and exception, the Court referred the case to a referee to take the proofs and report the same to the Court, without, however, making any findings of fact or conclusions of law thereon (76-79). To the referee's report filed on December 8, 1906, (78-83) appellant interposed objections the next day (78-83). On December 20, 1907, the Court made its findings of fact and conclusions of law (83-92) to which were added two findings requested by appellant (111) and the same day a final decree was entered in favor of appellee (111-113). Upon appeal by appellant to the Supreme Court of the Territory, that decree was affirmed (137-140; 147-155; 16 N. M. 281) and appellant appealed to this Court (147.)

The Supreme Court of the Territory, in affirming such decree of the District Court, adopted the findings of that Court (140) and modified and supplemented them with certain additional findings of its own (140-146). From those findings and the admissions of the pleadings, the essential facts of the case may be summarized as follows:

Statement of the Facts.

In 1902 there was formed The Arizona & Colorado Railroad Company of Arizona to construct a line run-

ning from Globe, Arizona, to a point on the boundary between Arizona and New Mexico near where the San Francisco river intersects the same. A Colorado corporation of the same name was incorporated to construct a line from Durango, Colorado, to a point on the boundary between Colorado and New Mexico near where the Las Animas river crosses the same. On October 6, 1904, appellee was formed under the laws of New Mexico to connect the contemplated lines of the Arizona and Colorado companies, the three companies to form a continuous system from Durango, Colorado, through New Mexico to Globe, Arizona, a distance of 485 miles (83 to 87). Concluding the history of the three companies as a system, it appears that the Arizona company has constructed only "a few miles of road" (87) and the Colorado company has never constructed any at all (87) and appellee, the New Mexico company, although nine years have expired and this litigation only involved 26 miles (10 and exhibit 35, a very small portion of its line (144), has never "constructed a single mile of railway anywhere in the Territory of New Mexico on any of its proposed lines" (144-145), and "the only evidence from which any inference can be drawn in favor of the plaintiff's (appellee's) good faith and intention and ability to construct its proposed railroad line, is to be found in the fact that it expended about one hundred and thirteen thousand dollars in surveys of its numerous proposed lines, of which the portion here in controversy is only a small part" (143-144-84).

Immediately after its organization, appellee had its engineers survey or run, examine and re-examine several tentative lines preliminary to locating its road (3-31-32) down the valley of the Animas river from the Colorado boundary to Farmington, New Mexico (3-31-32), and

that work was completed about February 1, 1905 (3-146) and was thereafter extended south to the Arizona line (85) and claims to have definitely located and adopted lines southerly from the San Juan river in and along the Gallegos canon and Chaco river, which are the only available gateways for a railroad southerly from the San Juan river (146).

At the time of the survey of the line claimed by appellee herein, it was "marked upon the ground by stakes set in the ground" (184).

On October 27th, 1904, appellee filed in the United States land office at Santa Fe, New Mexico, (84) a map of which defendant's exhibit 3a is a copy, showing a line adopted by appellee's directors on October 24, 1904, upon completion of its survey on October 21, 1904 (145). That map was approved by the secretary of the interior on April 1, 1905, (84 and see said exhibit). That line ran in part over public lands and in part over private lands. It covers only a portion of the line in controversy herein. No part of the line claimed by appellee herein south of the southern terminus of that map passes over any public lands between said point and Farmington (84-85).

The line shown on defendant's exhibit 3 was adopted by appellee's directors on December 3, 1904, and was based on a survey which ended on November 19, 1904, and was filed in said land office at Santa Fe on December 7, 1904, and was approved on May 5, 1905, (145-146 and see said exhibit).

The maps of definite location of appellee's line, of which plaintiff's exhibits 35 and 36 are copies, and which maps show the alleged line to protect which this suit was brought (146) were not filed in any public office till May 13, 1905, one day after this suit was

instituted, on which day they were filed in the office of the Secretary of the Territory, and ten days later, May 23, 1905, in the office of the Probate Clerk and Recorder of San Juan County, New Mexico (84).

The resolutions of appellee's directors adopting the lines shown on defendant's exhibits 3a and 3 were put in evidence (143). The line thus adopted is only in part identical with the controverted line shown on plaintiff's exhibits 35 and 36, that is to say: from the Colorado state line down to a point about a mile and a half northeast of the town of Aztec, New Mexico, the lines are identical, but at that point the lines diverge, reuniting at a point between six and a half and seven miles farther down the valley of the Animas, and continuing together for a distance of somewhat less than five miles to a point close to the so-called Bouseman crossing, where the lines again diverge, the ones shown on defendant's exhibits 3a and 3 turning away from the valley of the Animas on its course towards its terminus at the mouth of the Galloges canon on the San Juan river (143). The line in controversy herein from the point of divergence northeast of Aztec to the place where the lines reunite, and from the point of the second divergence to the town of Farmington, a distance of three and a half miles, is not covered by any order or resolution of appellee's directors put in evidence (143) and the adoption of this portion of the line found by the District Court (84) is only, finds the Territorial Supreme Court, "shown by the oral statement of plaintiff's witness, E. A. McFarland, plaintiff's (appellee's) chief engineer, who stated, with reference to exhibits Nos. 28 to 41, inclusive, that they were copies of maps and profiles presented by him and adopted by the board of directors of plaintiff (appellee) from a point on the boundary line between the

rado and New Mexico near where the Rio Las Animas crosses the same, thence following the valleys of the Las Animas, San Juan and Chaco rivers to a point near Manuelito on the Santa Fe Pacific Railroad, near the boundary line between Arizona and New Mexico, as to which statement defendant (appellant) immediately moved that it be stricken out, because involving the witness' conclusion and not constituting the best evidence of such action, the minutes of the meetings of the board of directors being the best and the only proper evidence of its action, which motion was afterward denied, and defendant (appellant) excepted to the ruling of the Court" (143-144).

In connection with its preliminary work appellee took from all except two of the several owners of the lands crossed by the line in controversy, written options for an undescribed right of way, and had verbal agreements with the remaining two (85). This was done in December, 1904 (145). Those agreements "each recited merely that it had been rendered probable that the line and track of plaintiff (appellee) might be finally located over the lands of the parties above mentioned without specifying any particular part thereof, and the agreements were to be effective only if the tracks of plaintiff's railway should be finally and permanently located over and across said lands" (145). All of those options, except three, by terms of express limitation therein contained, expired early in 1906 (145). The three exceptions contained no time limitation (145). Appellee never availed itself of any right given by such options (145) and has acquired absolutely no legal title to any land for its right of way except such as may have been conveyed to it as to two small tracts by certain deeds from Edith Young executed May 9, 1905, and re-

corded May 12, 1905, and from A. F. Miller executed June 5, 1905, and recorded June 7, 1905 (144-101-111).

Appellant, a Colorado corporation, ever since its organization in 1886 down to the present time has been engaged in the maintenance and operation of railroad lines in New Mexico (146). About February 1, 1905, appellant began at a point in Colorado, about three miles from Durango, and upon its then existing lines of railroad in said state, the construction of a line of railroad down the Animas valley and in the direction of Farmington (88). That construction was stopped by the preliminary injunction in this case on May 13, 1905 (18). After the dissolution of that injunction appellant proceeded with the work of constructing its road upon the line previously laid out by it (89-90), and completed the same at a cost of \$830,853.80, (146) and laid its rails upon the grade constructed by it, and in September, 1905, had its road in operation and was running trains thereon, and ever since then has been and is now engaged in the operation thereof (90-146). Appellant had, before such construction, instituted formal condemnation suits against the parties over whose lands its line ran (91). Appellant's line conflicted with appellee's at certain points as will be hereinafter pointed out. When appellant constructed its road, appellee's line was marked on the ground by stakes (88-89). In April, 1905, appellee's engineer requested a conference with appellant's engineer with a view to avoiding a conflict but such request was ignored (88.) Appellant's surveyors were told by various land owners of the line run by, and their agreements with, appellee (89). The District Court found that appellant's line from Bouseman south to Farmington was run by the same engineer who theretofore had surveyed appellee's line (89), but that

finding is modified by the finding of the Supreme Court: "That the engineer referred to in the latter part of the nineteenth finding of facts made by the court below, was one Leo B. Furman; that the evidence as to any work done, or as to any line located by said Furman for plaintiff is that which was given on behalf of plaintiff, to the effect that Mr. Furman had charge of the party which located the line from Aztec to the mouth of the Gallegos canyon, which is the line shown on defendant's exhibit 3, and which diverges from the valley of the Animas and from the line to protect which this suit was brought, at or near the Bouseman crossing and was completed November 17, 1904; that there is no evidence whatever as to when, or by whom, plaintiff's line between the Bouseman crossing and the town of Farmington was located, beyond the statement of one of plaintiff's engineer witnesses that it was subsequently surveyed and that C. L. Milton, locating engineer, started the line from a point on the Bouseman land to the town of Farmington, within two or three days after November 24, 1904, and the allegation in plaintiff's bill of complaint that plaintiff had completed its surveys to the town of Farmington about the first day of February, 1905" (145).

Appellant has acquired legal title to its line from all the land owners on the controverted line, some by deeds and conveyances and some by condemnation proceedings (111-101).

As to the general effect of the conflicts as an entirety, it appears that there are points of interference having individual features hereafter pointed out; that both lines run down the valley of the Animas river; that that valley is wide and level with room for the construction of two or more railroads without interference (91); that

appellee's line could be readily re-located (141-142-143) at a cost of not to exceed \$75 a mile (141) or a total for 28 miles of \$2,100. It also appears that with very slight changes the cost of which could be readily ascertained in money appellee could construct and operate its claimed line (142-143). And there is neither allegation nor proof of any inability on appellant's part to pay any damages which might possibly be incurred by appellee in consequence of any change in its surveyed line (143).

Exhibits 270 and 270a show appellee's claimed line and also appellant's constructed line and all the points of conflict (141). Both appellee's line and appellant's line started on the east side of the Animas river, appellant's line being east of appellee's (146-91). The lines run without interference until they reach the property of William Whitney, close to the east end of a rocky hill, near the place called Cedar Hill. This is known as the Whitney Crossing (141). Appellee only had a verbal agreement with Whitney (85). At a point a little less than a mile and a half north of the Whitney Crossing there begins at station 1093812 P. T. on appellant's line, a tangent or straight line which continues to said Whitney Crossing; at the beginning point of such tangent appellee's line is 200 feet west of appellant's and runs southerly and parallel with appellant's line for 2,000 feet there reaching the end of a tangent one and a quarter miles in length, at which point appellee's line makes a slight curve to the right and at a distance from that point of 2,200 feet makes another curve to the left, and a few hundred feet from that curve another slight curve to the right, thence running in a straight line to the point of intersection; the widest point of divergence between the two lines is 600 feet; all of which appears on defendant's exhibit 270 (141-142). If appellee's line were so located

as to avoid that curvature and were continued upon a straight line from a point opposite the beginning of the tangent on appellant's line, the appellee could have a tangent of two and a half miles before it would approach appellant's line, and thus this crossing would be avoided; and the only obstacle to appellee's construction of its road upon such tangent would be the necessary cutting through the hill referred to at a distance of 200 feet from appellant's line, and the added expense thereby caused could be definitely ascertained and measured in money (142). At the taking of testimony, appellant offered to appellee to consent to the construction by appellee of its line upon the right of way around the hill, with only the necessary clearance between the tracks, and that offer was repeated in the Territorial Supreme Court (142) and is hereby repeated in this Court. If appellee should avail itself of this offer and would continue its tangent to a point a short distance from the point of such hill, it could with a very slight curve, cut the point of that hill upon appellant's right of way at an added cost for construction of not to exceed \$6,000 (142).

The next crossing is on the lands of W. W. McEwen, two and a half miles south of the Whitney crossing and eight and a half miles north of the town of Aztec (141). There is no other crossing between the McEwen crossing and a point two and a half miles south of Aztec (141), a distance of eleven miles. Appellee only had a verbal agreement with McEwen (85). The next crossing is on the land of Miss Young, two and a half miles below Aztec, and known as Young's Crossing; the next is six miles below on the lands of Frank M. Quinn, known as the Quinn Crossing; the next is a mile below that on Marion B. Hendrickson's land, and is known as the Hendrickson Crossing; the

next is on the land of Thomas R. Bouseman, and is known as the Bouseman Crossing (141). Appellee's options from all those parties expired early in 1906 (145) except that Bouseman's agreement of December 12, 1904, had no time limit (145). Less than a mile below Bouseman Crossing is an encroachment on the William Sutherland land, close to which is another encroachment on the J. E. McCarthy land, and two miles below that is an encroachment on the Benjamin Rickett' land, and the final crossing is half a mile below on the A. F. Miller land (141). Appellee's agreements with all those parties expired early in 1906, except that of J. E. McCarthy of December 20, 1904, which contained no time limitation (145). Appellant acquired legal title from such owners for its right of way (50 to 56, 111-101), whereas when this suit was begun appellee had only acquired a title on the Edith B. Young tract (101-111) by deed executed May 9, 1905, and recorded May 12, 1905, the day the suit was begun, and after appellant had instituted condemnation proceedings on the Young tract (144). After this suit was begun appellee acquired title on the A. F. Miller tract by deed dated June 5, 1905, and recorded June 7, 1905 (144). That is the full extent of appellee's acquisition of legal title to its right of way (144).

The Young Crossing, the Bouseman Crossing, the Miller Crossing and the Sutherland, Ricketts and Miller encroachments are all on that portion of appellee's line as to which no order of adoption was shown and which rests wholly on the oral testimony of McFarland (144).

Appellant's constructed line from Station 2127x93, half way between mile posts 480 and 490 to Station 2883x23, about 2,000 feet beyond mile post 492, a distance of three miles, is a tangent or straight line, while

over the same distance there are five curves in appellee's line, making the three intersections known as the Quinn, Hendrickson and Bouseman Crossings, as is shown in exhibit 270a (142).

Appellant's title on the Whitney, McEwen and Bouseman Crossings was acquired by deed in March and April, 1905, prior to the institution of this suit (50-56).

Finally it appears that from the point hereinbefore referred to as the beginning of the tangent above the first or Whitney Crossing, appellee could, by paralleling the constructed line of appellant on the west side thereof all the way to Farmington, have a line with very much less curvature not only at the points above specified, but at numerous other places as appears by exhibits 270 and 270a and the additional expense of constructing such a line can be readily ascertained and measured in money (142-143).

THE DECREE.

Upon those facts the court below made its decree (137, 138):

1. That appellee do have and recover of appellant the possession of the lines and railroad right of way adopted by appellee, and that appellant surrender to appellee possession thereof when appellee should have constructed twenty miles of railroad complete for use in New Mexico along such adopted line and shall actually enter upon the grading of the controverted line between Farmington and Durango.

2. That the right of appellee to take, and the duty of appellant to vacate, the right of way was limited to five years from the date of the decree, to-wit, August 26, 1911.

3. That appellant be restrained from prosecuting its instituted condemnation suits.

4. That appellant be restrained from further trespass except as it is permitted to operate its road during the time above mentioned.

5. Awarding costs to appellee.

THE QUESTIONS INVOLVED.

The questions involved herein may be succinctly stated as follows:

1. Whether or not the equities of the case are not with appellant instead of appellee, and whether the facts instead of justifying the decree entered did not demand the entry of a decree in favor of appellant.

2. Which, as between the parties hereto, had the better right to the possession and occupancy of the right of way involved.

3. Whether appellee, never having been in possession of the right of way, could maintain this action.

4. Whether appellee did not have an adequate remedy at law, and whether the facts present a case of irreparable injury justifying the interposition of the equitable powers of the court.

5. Whether or not appellee in good faith intended to build a road on the claimed right of way, or had the ability so to do.

6. Whether appellee acted with due diligence in the premises or has been guilty of laches.

7. Whether appellee had the right to so checker the Animas River valley with surveys as to make it impossible for another railroad to be located and constructed without interference therewith.

The questions are raised by the assignment of errors (158-173), showing the following

SPECIFICATION OF ERRORS.

I.

The Supreme Court of the Territory of New Mexico erred in affirming the judgment of the District Court of Bernalillo County, New Mexico, in said cause (158).

II.

The Supreme Court of the Territory of New Mexico erred in not reversing the judgment of the District Court of Bernalillo County, New Mexico, in said cause (158).

III.

The Supreme Court of the Territory of New Mexico erred in not reversing, and erred in affirming that portion of the decree of the District Court of Bernalillo County, New Mexico, wherein and whereby it is considered, ordered, adjudged and decreed that the issues herein be and they are found with the plaintiff; and that the plaintiff is entitled to the relief prayed herein, subject only to the limitation or condition that it shall not be authorized to oust the defendant from the possession of that portion of the line in controversy now occupied by the defendant company in the actual operation of its line of railway until such time as plaintiff shall have constructed at least twenty miles of railroad, substantially along the line adopted by it as set forth and described in its complaint, and shall actually enter upon the grading of its adopted line of railroad between Farmington, New Mexico, and Durango, Colorado, along said line; and, provided, that the plaintiff shall have complied with all conditions precedent to such construction, still to be performed by it in order to conform to the provisions of the law of New Mexico relating to the laying out and construction of railroads (158-159).

IV.

The Supreme Court of the Territory of New Mexico erred in not reversing, and erred in affirming that portion of the decree of the District Court of Bernalillo County, New Mexico, wherein and whereby it is considered, ordered, adjudged and decreed by the court that the plaintiff, The Arizona and Colorado Railroad Company of New Mexico, do have and recover of and from the defendant, The Denver and Rio Grande Railroad Company, the possession of the said lines and railroad right of way of the said plaintiff, by it adopted, surveyed and located, as described in the complaint herein, and as set forth in the maps and profiles filed in the office of the Secretary of the Territory of New Mexico, and in the office of the Probate Clerk and ex-Officio Recorder of the County of San Juan, in the Territory of New Mexico, and that the said defendant do vacate and surrender to plaintiff the possession thereof, when the said plaintiff shall have constructed at least twenty miles of railroad substantially complete for use, within the Territory of New Mexico along the line adopted by it as set forth and described in its complaint, and shall actually enter upon the grading of its line of railroad between Farmington, New Mexico, and Durango, Colorado, along the said line adopted by plaintiff and in the said complaint described, and provided that the plaintiff shall have complied with all conditions precedent to such construction, still to be performed by it in order to conform to the provisions of the laws of New Mexico relating to the laying out and construction of railroads (159).

V.

The Supreme Court of the Territory of New Mexico erred in not reversing, and erred in affirming that

portion of the decree of the District Court of Bernalillo County, New Mexico, wherein and whereby it is further considered, ordered, adjudged and decreed, that the rights of plaintiff to enter upon said right of way, and to take, grade and possess the same as hereinabove decreed, and the duty of defendant to vacate and surrender to plaintiff the possession thereof, shall be limited in time to the space and period ending five years from the date of this decree (159).

VI.

The Supreme Court of the Territory of New Mexico erred in not reversing, and erred in affirming that portion of the decree of the District Court of Bernalillo County, New Mexico, wherein and whereby it is further considered, ordered, adjudged and decreed that the said defendant be and it is restrained and enjoined henceforth from prosecuting further any condemnation suits or actions now pending or which might be hereafter by defendant instituted, in so far as such suits or actions may in any wise affect the rights and interests of the plaintiff company in and to the said line so located and adopted by it, and hereinabove mentioned (159-160).

VII.

The Supreme Court of the Territory of New Mexico erred in not reversing, and erred in affirming that portion of the decree of the District Court of Bernalillo County, New Mexico, wherein and whereby it is further considered, ordered, adjudged and decreed that the said defendant be and it hereby is restrained and enjoined henceforth from any further or other entry or trespass upon the said line of road so adopted and located by said plaintiff, and hereinabove mentioned except only in so far as it is by this decree expressly per-

mitted to continue the operation of its road as now constructed until such time as in this decree above provided (160).

VIII.

The Supreme Court of the Territory of New Mexico erred in not reversing, and erred in affirming that portion of the decree of the District Court of Bernalillo County, New Mexico, wherein and whereby it is further considered, ordered, adjudged and decreed that the plaintiff do further have and recover of and from defendant its costs herein to be taxed (160).

IX.

The Supreme Court of the Territory of New Mexico erred in holding that the special findings of fact made by the District Court of Bernalillo County, New Mexico, was sufficient to sustain the judgment of the decree entered in said District Court against this appellant, The Denver and Rio Grande Railroad Company (160).

X.

The Supreme Court of the Territory of New Mexico erred in holding that the statement of facts by it adopted, found and made in this cause was sufficient to support, and erred in not holding that such statement of facts did not justify the judgment or decree entered herein in the District Court of Bernalillo County, New Mexico (160).

XI.

The Supreme Court of the Territory of New Mexico erred in rendering judgment in this cause in said Supreme Court in favor of appellee and against appellant herein, and erred in not making and entering a judgment or decree in favor of appellant and against appellee herein (160).

XII.

The Supreme Court of the Territory of New Mexico erred in that the statement of facts by it adopted, found and made in this cause is insufficient to support and does not justify the final judgment or decree entered herein by said Supreme Court, and said Supreme Court erred in entering or making said final judgment or decree herein upon such statement of facts against this appellant and in favor of appellee, and erred in not making and entering upon such statement of facts a judgment or decree in favor of appellant and against appellee (161).

XIII.

The Supreme Court of the Territory of New Mexico erred in holding that upon the facts found by the District Court of Bernalillo County, New Mexico, and the facts found by said Supreme Court, and the statement of facts adopted, found or made by said Supreme Court, appellee was entitled to the relief or to the judgment awarded appellee, and erred in not entering and making upon such facts and statement of facts a judgment or decree in favor of appellant (161).

XIV.

The Supreme Court of the Territory of New Mexico erred in not holding upon the statement of facts adopted, found or made by it that appellee herein was never in possession of the right of way in dispute herein, and had nothing for the protection of which this suit or action could be brought or maintained by appellee herein (161).

XV.

The Supreme Court of the Territory of New Mexico erred in holding upon the statement of facts by it

adopted, found or made that appellee herein had any right prior or better than that of the appellant herein to the occupancy and possession of the right of way in dispute herein (161).

XVI.

The Supreme Court of the Territory of New Mexico erred in holding upon the statement of facts adopted, found or made by it that appellee herein was ever in possession of the right of way in dispute herein, or that appellee had anything for the protection of which this suit could be brought or maintained by appellee herein (161).

XVII.

The Supreme Court of the Territory of New Mexico erred in not holding upon the statement of facts by it adopted, found or made that appellee herein did not have any right prior or better than that of appellant herein to the occupancy and possession of the right of way in dispute herein (161).

XVIII.

The Supreme Court of the Territory of New Mexico erred in holding upon the statement of facts by it adopted, found or made that appellee herein had acted in good faith or was entitled to any relief herein (162).

XIX.

The Supreme Court of the Territory of New Mexico erred in not holding upon the statement of facts by it adopted, found or made that appellee herein had not acted in good faith and was not entitled to any relief herein (162).

XX.

The Supreme Court of the Territory of New Mexico erred in holding upon the statement of facts by it adopted,

found or made that appellee herein was not guilty of laches herein, and was entitled to any relief herein (162).

XXI.

The Supreme Court of the Territory of New Mexico erred in not holding upon the statement of facts by it adopted, found or made herein that appellee herein was guilty of laches herein, and was not entitled to any relief herein (162).

XXII.

The Supreme Court of the Territory of New Mexico erred in holding upon the statement of facts by it adopted, found or made herein that any interference by appellant with the line claimed by appellee herein could have been avoided (162).

XXIII.

The Supreme Court of the Territory of New Mexico erred in not holding upon the statement of facts by it adopted, found or made herein that any interference by appellant with the line claimed by appellee herein could not have been avoided (162).

XXIV.

The Supreme Court of the Territory of New Mexico erred in holding upon the statement of facts by it adopted, found or made herein that the interference by appellant with the line claimed by appellee herein, as shown by the facts and record herein, could have been avoided (162).

XXV.

The Supreme Court of the Territory of New Mexico erred in not holding upon the statement of facts by it adopted, found or made herein that such interference by appellant with the line claimed by appellee herein, as

shown by the facts and record herein, could not be avoided by appellant herein (162).

XXVI.

The Supreme Court of the Territory of New Mexico erred in holding upon the statement of facts by it adopted, found or made herein that the appellee's line of right of way as located, is the best obtainable line (163).

XXVII.

The Supreme Court of the Territory of New Mexico erred in not holding upon the statement of facts by it adopted, found or made herein that appellee's line of right of way, as located, is not the best obtainable line (163).

XXVIII.

The Supreme Court of the Territory of New Mexico erred in holding upon the statement of facts by it adopted, found or made herein that appellee could not at small expense get a better line than the one by it claimed in this action, and that therefore appellee ought to have and maintain this action in equity and did not have a complete and adequate remedy at law in damages (163).

XXIX.

The Supreme Court of the Territory of New Mexico erred in not holding upon the statement of facts by it adopted, found or made herein that appellee could at small expense get a better line than the one by it claimed in this action, and that therefore appellee ought not to have or maintain this action in equity as appellee had a full, fair, complete and adequate remedy at law in damages (163).

XXX.

The Supreme Court of the Territory of New Mexico erred in holding upon the statement of facts by it

adopted, found or made herein that appellee could not at small expense get as good and sufficient line as the one claimed by it in this action, and that therefore appellee ought not to have or maintain this action in equity and did not have a complete and adequate remedy at law in damages (163).

XXXI.

The Supreme Court of the Territory of New Mexico erred in not holding upon the statement of facts by it adopted, found or made herein that appellee could at small expense get as good and sufficient line as the one claimed by it in this action, and that therefore appellee ought not to have or maintain this action in equity as appellee had a full, fair, complete and adequate remedy at law in damages (163).

XXXII.

The Supreme Court of the Territory of New Mexico erred in holding upon the statement of facts by it adopted, found or made that appellee had ever adopted the surveyed line of right of way to protect which this action was brought (163-164).

XXXIII.

The Supreme Court of the Territory of New Mexico erred in not holding upon the statement of facts by it adopted, found or made that appellee had never adopted the surveyed line of right of way to protect which this action was brought (164).

XXXIV.

The Supreme Court of the Territory of New Mexico erred in holding upon the statement of facts by it adopted, found or made that any or any sufficient notice to appellant of appellee's location or adoption of such line of right of way in dispute herein was shown (164).

XXXV.

The Supreme Court of the Territory of New Mexico erred in not holding upon the statement of facts by it adopted, found or made herein that no notice or no sufficient notice to appellant of appellee's location or adoption of such line of right of way in dispute herein was shown (164).

XXXVI.

The Supreme Court of the Territory of New Mexico erred in affirming the judgment of the District Court of Bernalillo County, New Mexico, and erred in not reversing such judgment of said District Court, and erred in rendering judgment in said Supreme Court against appellant and in favor of appellee herein, and erred in not entering judgment in said Supreme Court in favor of appellant and against appellee herein, in that the findings of fact made by the District Court of Bernalillo County, New Mexico, which were adopted by the Supreme Court of New Mexico, as findings for use upon this appeal, are insufficient to support the judgment against appellant, because they are defective, and untrue as to important and material matters, as shown by the additional and specific findings made by said Supreme Court, this assignment of error being subdivided as follows:

(a) While the seventh finding made by the District Court and adopted by the Supreme Court, among other things, states that plaintiff's surveyed line was and is the best line and the best line obtainable between the Colorado state line and the town of Farmington, yet the additional and specific findings made by the Supreme Court numbered 3 to 7, both inclusive, and 25, distinctly point out that plaintiff's said line is not only not the best line or the best line obtainable, but is in many parts a pos-

istively bad line, and much inferior to the line constructed by defendant over substantially the same ground, and that plaintiff could obtain a much better line, the added expense of which would not be great and could be easily ascertained and measured in money.

(b) While the third finding made by the District Court and adopted by the Supreme Court declares that the plaintiff, prior to the first day of January, 1905, adopted its surveyed line between the boundary line of the State of Colorado and the town of Farmington, New Mexico, and while repeated references are made in many of the others of said findings to the adoption of said line by plaintiff, as in the fourth, fifth, sixth, seventh, tenth, eleventh, thirteenth, fourteenth, seventeenth, nineteenth and twenty-second of said findings, yet it is distinctly made to appear by the ninth to the fourteenth of the additional and more specific findings made by said Supreme Court, that said line to the extent of more than ten miles out of about twenty-seven miles in question, has never been adopted by plaintiff as required by law.

(c) While the fifth finding of fact made by the District Court and adopted by the Supreme Court declares that on October 27, 1904, plaintiff filed in the United States land office at Santa Fe, New Mexico, its map of that portion of its line north of the town of Farmington, which lies between a point north of and near the town of Aztec and the said boundary between Colorado and New Mexico, yet the tenth and eleventh of the additional and specific findings made by said Supreme Court show that said fifth finding is not true, as will particularly appear by reference to defendant's exhibit 3a, which is made a part of said findings.

(d) While the sixth finding of fact made by the District Court and adopted by the Supreme Court sets

out that the plaintiff agreed with substantially all the owners of lands crossed by its line as to the compensation to be paid for the taking and occupation of such line for the use of plaintiff, and secured from practically all of such owners options and agreements in writing authorizing it to enter upon and take such land, with but two exceptions, yet the seventeenth of the additional and specific findings made by said Supreme Court shows the said sixth finding is defective and as misleading as though it were directly untrue.

(e) While the thirteenth finding of fact made by the District Court and adopted by said Supreme Court declares that the plaintiff and its allied corporations appear to have proceeded in good faith and with due diligence in the survey, location and selection of said line of railroad, yet the thirteenth, fourteenth, fifteenth, sixteenth, nineteenth and twentieth of the additional and specific findings made by said Supreme Court show that said plaintiff has not proceeded in good faith and with due diligence.

(f) While the nineteenth finding of fact made by the District Court and adopted by said Supreme Court declares, among other things, that the survey of that portion of appellant's line south of the Bouseman crossing and between that place and the town of Farmington, was made by the same engineer who had theretofore, while in the service of the plaintiff, surveyed and located plaintiff's line between said points, yet the eighteenth of the additional and specific findings made by said Supreme Court shows that in this particular said nineteenth finding is wholly untrue.

(g) While the twenty-sixth finding of fact made by the District Court and adopted by said Supreme Court declares that the valley of the Animas river is a com-

paratively wide, level valley, with room for the construction of two or more railroads without interference with each other, and that no necessity or sufficient reason existed for any crossing of plaintiff's line by the defendant company, or any interference therewith, yet the said additional and specific findings made by said Supreme Court, taken in connection with the map exhibits made parts of said findings, show that plaintiff's line was so located as to make it impossible for another railroad to be located and constructed without interference therewith (164-166).

XXXVII.

The Supreme Court of the Territory of New Mexico erred in affirming the judgment of the District Court of Bernalillo County, New Mexico, and erred in not reversing such judgment of said District Court, and erred in rendering judgment in said Supreme Court against appellant and in favor of appellee herein, and erred in not entering judgment in said Supreme Court in favor of appellant and against appellee herein, in that while the seventh finding made by the District Court and adopted by the Supreme Court, among other things, states that plaintiff's surveyed line was and is the best line and the best line obtainable between the Colorado state line and the town of Farmington, yet the additional and specific findings made by the Supreme Court numbered 3 to 7, both inclusive, and 25, distinctly point out that plaintiff's said line is not only not the best line or the best line obtainable, but is in many parts a positively bad line, and much inferior to the line constructed by defendant over substantially the same ground, and that plaintiff could obtain a much better line, the added expense of which would not be great and could be easily ascertained and measured in money (166).

XXXIX.

The Supreme Court of the Territory of New Mexico erred in affirming the judgment of the District Court of Bernalillo County, New Mexico, and erred in not reversing such judgment of said District Court, and erred in rendering judgment in said Supreme Court against appellant and in favor of appellee herein, and erred in not entering judgment in said Supreme Court in favor of appellant and against appellee herein, in that while the third finding made by the District Court and adopted by the Supreme Court declares that the plaintiff, prior to the first day of January, 1905, adopted its surveyed line between the boundary line of the State of Colorado and the town of Farmington, New Mexico, and while repeated references are made in many of the others of said findings to the adoption of said line by plaintiff, as in the fourth, fifth, sixth, seventh, tenth, eleventh, thirteenth, fourteenth, seventeenth, nineteenth and twenty-second of said findings, yet it is distinctly made to appear by the ninth to the fourteenth of the additional and more specific findings made by said Supreme Court, that said line to the extent of more than ten miles out of about twenty-seven miles in question, has never been adopted by plaintiff as required by law (166).

XL.

The Supreme Court of the Territory of New Mexico erred in affirming the judgment of the District Court of Bernalillo County, New Mexico, and erred in not reversing such judgment of said District Court, and erred in rendering judgment in said Supreme Court against appellant and in favor of appellee herein, and erred in not entering judgment in said Supreme Court in favor of appellant and against appellee herein, in that while the fifth

finding of fact made by the District Court and adopted by the Supreme Court declares that on October 27, 1904, plaintiff filed in the United States land office at Santa Fe, New Mexico, its map of that portion of its line north of the town of Farmington, which lies between a point north of and near the town of Aztec, and the said boundary between Colorado and New Mexico, yet the tenth and eleventh of the additional and specific findings made by said Supreme Court show that said fifth finding is not true, as will particularly appear by reference to defendant's exhibit 3a, which is made a part of said finding (167).

XLI.

The Supreme Court of the Territory of New Mexico erred in affirming the judgment of the District Court of Bernalillo County, New Mexico, and erred in not reversing such judgment of said District Court, and erred in rendering judgment in said Supreme Court against appellant and in favor of appellee herein, and erred in not entering judgment in said Supreme Court in favor of appellant and against appellee herein, in that while the sixth finding of fact made by the District Court and adopted by said Supreme Court sets out that the plaintiff agreed with substantially all the owners of lands crossed by its line as to the compensation to be paid for the taking and occupation of such line for the use of plaintiff, and secured from practically all of such owners options and agreements in writing authorizing it to enter upon and take such land, with but two exceptions, yet the seventeenth of the additional and specific findings made by said Supreme Court shows that said sixth finding is defective and as misleading as though it were directly untrue (167).

XLII.

The Supreme Court of the Territory of New Mexico erred in affirming the judgment of the District Court of Bernalillo County, New Mexico, and erred in not reversing such judgment of said District Court, and erred in rendering judgment in said Supreme Court against appellant and in favor of appellee herein, and erred in not entering judgment in said Supreme Court in favor of appellant and against appellee herein, in that while the thirteenth finding of fact made by the District Court and adopted by said Supreme Court declares that the plaintiff and its allied corporations appear to have proceeded in good faith and with due diligence in the survey, location and selection of the said line of railroad, yet the thirteenth, fourteenth, fifteenth, sixteenth, nineteenth and twentieth of the additional and specific findings made by said Supreme Court show that said plaintiff has not proceeded in good faith and with due diligence (167-168).

XLIII.

The Supreme Court of the Territory of New Mexico erred in affirming the judgment of the District Court of Bernalillo County, New Mexico, and erred in not reversing such judgment of said District Court, and erred in rendering judgment in said Supreme Court against appellant and in favor of appellee herein, and erred in not entering judgment in said Supreme Court in favor of appellant and against appellee herein, in that while the nineteenth finding of fact made by the District Court and adopted by said Supreme Court declares, among other things, that the survey of that portion of appellant's line south of the Bouseman crossing and between that place and the town of Farmington, was made by the same engineer who had theretofore, while in the service

of the plaintiff, surveyed and located plaintiff's line between said points, yet the eighteenth of the additional and specific findings made by said Supreme Court shows that in this particular said nineteenth finding of fact is wholly untrue (168).

XLIV.

The Supreme Court of the Territory of New Mexico erred in affirming the judgment of the District Court of Bernalillo County, New Mexico, and erred in not reversing such judgment of said District Court, and erred in rendering judgment in said Supreme Court against appellant and in favor of appellee herein, and erred in not entering judgment in said Supreme Court in favor of appellant and against appellee herein, in that while the twenty-sixth finding of fact made by the District Court and adopted by said Supreme Court declares that the valley of the Animas river is a comparatively wide, level valley, with room for the construction of two or more railroads without interference with each other, and that no necessity or sufficient reason existed for any crossing of plaintiff's line by the defendant company, or any interference therewith, yet the said additional and specific findings made by said Supreme Court, taken in connection with the map exhibits made parts of said findings, show that plaintiff's line was so located as to make it impossible for another railroad to be located and constructed without interference therewith (168).

XLV.

The Supreme Court of the Territory of New Mexico erred in affirming the judgment of the District Court of Bernalillo County, New Mexico, and erred in not reversing such judgment of said District Court and erred in rendering judgment in said Supreme Court against

appellant and in favor of appellee herein, and erred in not entering judgment in said Supreme Court in favor of appellant and against appellee herein, in that there is no finding to sustain the material allegations of the bill of complaint as to the ability of plaintiff to construct and operate its line of railroad (168-169).

XLVI.

The Supreme Court of the Territory of New Mexico erred in affirming the judgment of the District Court of Bernalillo County, New Mexico, and erred in not reversing such judgment of said District Court, and erred in rendering judgment in said Supreme Court against appellant and in favor of appellee herein, and erred in not entering judgment in said Supreme Court in favor of appellant and against appellee herein, in that there is no finding that plaintiff has ever been in possession of plaintiff's alleged line and right of way to protect which this suit was brought (169).

XLVII.

The Supreme Court of the Territory of New Mexico erred in affirming the judgment of the District Court of Bernalillo County, New Mexico, and erred in not reversing such judgment of said District Court, and erred in rendering judgment in said Supreme Court against appellant and in favor of appellee herein, and erred in not entering judgment in said Supreme Court in favor of appellant and against appellee herein, in that the District Court erred in refusing to strike out oral evidence of adoption by plaintiff's board of directors of the line to protect which this suit was brought, and the Supreme Court erred in its twelfth additional and specific finding, when it declared that such adoption was shown by the oral statement of plaintiff's witness, such oral evidence being inadmissible (169).

XLVIII.

The Supreme Court of the Territory of New Mexico erred in affirming the judgment of the District Court of Bernalillo County, New Mexico, and erred in not reversing such judgment of said District Court, and erred in rendering judgment in said Supreme Court against appellant and in favor of appellee herein, and erred in not entering judgment in said Supreme Court in favor of appellant and against appellee herein, in that it affirmatively appears from the additional and specific findings of fact made by said Supreme Court, that if the plaintiff is in any way injured or damaged by the location and construction of appellant's railroad, such injury and damage can be fully compensated in money, so that there is no question possible of irreparable injury calling for relief by way of injunction (169).

XLIX.

The Supreme Court of the Territory of New Mexico erred in stating in its opinion that a witness, McFarland, was the engineer in charge of plaintiff's survey parties, who actually surveyed and staked out the right of way in question, as it appears by the Court's eighteenth additional finding that there is no evidence whatever as to when or by whom plaintiff's line between the Bouseman crossing and the town of Farmington was located beyond the statement of one of plaintiff's witnesses that it was subsequently surveyed and that C. L. Mitton, locating engineer, started the line from a point on the Bouseman land to the town of Farmington after November 24, 1904 (169-170).

L.

The Supreme Court of the Territory of New Mexico erred in the statement in its opinion that the witness

McFarland testified without objection that certain maps covering a surveyed line from the Colorado state line south along the valley of the Animas river to and through the town of Farmington represented the right of way in question, as surveyed and adopted by plaintiff's board of directors, when it appears by the record, and by the twelfth additional finding of the said Court that defendant made timely objection to the question propounded to the witness, and as soon as the witness McFarland made his statement about the maps, moved that it be stricken out (170).

LI.

The Supreme Court of the Territory of New Mexico erred in the view set out in its opinion that it appeared conclusively that the resolutions of the board of directors show the adoption of all of the right of way except that portion near the town of Aztec which includes the Young crossing, as this is inconsistent with the tenth, eleventh, twelfth and fourteenth additional findings, which plainly show that not only is there a portion of the line not covered by any order of the board of directors, between six and a half and seven miles in length upon which the Young crossing occurs, but that there is also a distance of about three and a half miles below the second point of divergence of plaintiff's lines which is not covered by any order of adoption by plaintiff's board of directors (170).

LII.

The Supreme Court of the Territory of New Mexico erred in the view set forth in its opinion that the question of the admissibility of oral evidence of corporate acts on behalf of the corporation against the interest of others, was not necessary to a determination of

the issues of the case, nor whether the resolutions of adoption offered in evidence by the appellee included all of the line between Colorado and the town of Farmington, as that view is based upon the fact of ownership by plaintiff of the land at the Young crossing and ignores entirely any consideration of that portion of the line to protect which the suit was brought, from the point of the second divergence of the two lines of plaintiff to the town of Farmington upon which occur the Bouseman crossing and a number of encroachments and interferences on the land of Sutherland, Ricketts and Miller, as plainly appears by the fourteenth additional finding of the court (170-171).

LIII.

The Supreme Court of the Territory of New Mexico erred in the view set forth in its opinion that appellee could protect its rights to the land at the Young crossing regardless of whether this particular piece of right of way had been actually adopted as a permanent location by specific resolution or not, because the appellee was the actual owner of the land at that place, when protection of land not covered by the adopted line of appellee was not within the issues of the case, nor covered by the allegations of the bill of complaint (171).

LIV.

The Supreme Court of the Territory of New Mexico erred in its statement in its opinion that finding of fact No. 3 of the District Court which is quoted in the opinion, is supported by the testimony, so far as it refers to the Young crossing, which finding is to the effect that the plaintiff and appellee had adopted the line between Colorado and the town of Farmington prior to the first day of January, 1905, as it is shown by the

Court's additional findings eleven, twelve and thirteen, that the portion of the line upon which the Young crossing occurs was never adopted by the plaintiff's board of directors (171).

LV.

The Supreme Court of the Territory of New Mexico erred in its statement in its opinion that as to the tract of land at the Young crossing the appellee was owner of same by purchase prior to the institution of the suit, and that no legal steps whatever were taken by the appellant to gain possession of this particular tract until after the institution of the case at bar, when it appears by the thirteenth additional findings of the court that at the time of the execution of the deed from Edith Young conveying 6.59 acres on May 9, 1905, which was recorded on May 12, 1905, the day of the institution of this suit, a condemnation proceeding begun by defendant under the statute of New Mexico was pending against said Edith Young for the purpose of condemning a portion of the land embraced within the right of way described in said deed (171).

LVI.

The Supreme Court of the Territory of New Mexico erred in the view expressed in its opinion that as to whether the appellee's line as located was the best obtainable line or not the court would not inquire because there was conflicting testimony in the court below and that court had made findings in favor of appellee, when said Supreme Court ought to have re-examined the testimony which was before the District Court and fully determined therefrom what was the fact, as none of the testimony had been taken before the Court but was all taken by an examiner, and such error is also affirmatively

shown by the additional findings three, four, six and seven of said Supreme Court of New Mexico, which clearly point out not only that appellee's line was not the best line obtainable, but was a positively inferior and bad line (171-172).

LVII.

The Supreme Court of New Mexico erred in the statement in its opinion that there was a specific finding by the District Court as to the allegations of good faith and ability on the part of appellee to construct a railroad, and that such finding is based upon ample evidence to sustain the same, as will appear by an inspection of the findings of the District Court which contain nothing as to the ability of plaintiff and appellee to construct its road and by the Court's additional finding sixteen, which negatives in effect any idea of good faith or intention and ability on the part of plaintiff and appellee to construct its proposed railroad line (172).

LVIII.

The Supreme Court of the Territory of New Mexico erred in its statement that there was a specific finding by the District Court as to the contention that plaintiff and appellee ought not to succeed because it was guilty of laches, and that such finding was based upon ample evidence to sustain the same, when there was no such specific finding by the District Court and the additional findings sixteen, seventeen, nineteen and twenty clearly show unexplained and unexplainable laches on the part of plaintiff and appellee (172).

POINT I.

Appellee never adopted the line to protect which this suit was brought. It, therefore, had no rights in the premises.

Appellee claimed relief in this action and was granted such upon the principle that: where rival railroad companies are seeking to acquire the same land for railway purposes at the same time, the prior right will attach to that company which first locates its line, and that in the absence of statutory regulations to the contrary, the first location belongs to that company which first defines and marks its route and adopts the same for its permanent location by authoritative corporate action, with the present intention in good faith to construct its line upon such route with reasonable diligence.

We shall hereafter show that such rule has never been applied except under statutory provisions different from those of New Mexico, and even then only under circumstances widely different from those of this case. Passing this for the time being and assuming for the sake of argument the applicability of that principle to this case, it is as clear as the noon-day sun that appellee does not come within its protection for several reasons, the first of which is that appellee never adopted this line to protect which this suit was brought.

At the threshold of this case then, we come to the question: what are the requisites of such a valid completed location of a railroad route as will secure such a priority?

It is universally recognized that a mere tentative survey made to ascertain the feasibility of a route cannot be considered a completed location, though every measurement be made and every stake driven with math-

ematical accuracy. Section 3847, sub-division 1, of the compiled laws of New Mexico of 1897, authorized appellee:

"To cause such examinations and surveys to be made as may be necessary to the selection of the most suitable routes for its railroad and telegraph lines, and for that purpose, by its officers and agents to enter upon the lands and waters of the territory, of private persons and of private corporations, subject, however, to responsibility for all damages which it may do thereto."

Under that statute appellee had the right to make experimental surveys at pleasure before finally locating its route. It had the right to run and stake many lines, since that course was necessary in order to enable it to finally decide upon the line on which it would construct its line.

2 Elliott Railroads, Sec. 804, p. 231.

Sioux City Land Co. v. Griffey, 143 U. S.

32.

Neal v. Railroad, 2 Grant Cas. (Pa.) 137.

Acting under that authority appellee had its engineers run, survey, examine, re-examine, mark and stake several tentative lines preliminary to locating its road (3-31-32). Engineers cannot locate a railroad so as to give title to the company that employs them. An engineer cannot by surveying and marking a line make a location and effect a valid appropriation of the line. Mere experimental surveys conferred no vested right to the line. Such preliminary work by appellee was not a location of the line.

- Morris & Essex R. R. v. Blair, 9 N. J. Eq.
635.
2 Elliott Railroads (2nd Ed.), Section 927,
804.
East St. Louis R. R. v. Trust Co., 248 Ill.
559. 94 N. E. 149.
C. & O. Ry. Co. v. Deepwater Ry., 57 W. Va.
641. 50 S. E. 890.
Fayetteville Ry. v. Railroad, 142 N. C. 423,
55 S. E. 345.
Williamsport Ry. v. Phila. R. R., 141 Pa.
St. 407. 21 Atl. 645.
Kaufman v. Ry. Co., 210 Pa. St. 441, 60
Atl. 2.
Hagner v. Railroad, 154 Pa. St. 475. 25
Atl. 1082.
W. R. Railroad v. Telegraph Co. (Ark.), 98
S. W. 721.
Weidenfeld v. Sugar Run R. R., 48 Fed.
615.
Sioux City Co. v. Griffey, 143 U. S. 32.

The adoption of a route is an important corporate act. Section 3815 of the New Mexico laws of 1897 provides that:

"The corporate powers, business and property of all corporations formed under this act, must be exercised, conducted, controlled and managed by a board of not less than five nor more than eleven directors, to be elected from among the stockholders, who are citizens of the United States. Unless a quorum be present and acting, no business performed or act done, shall be valid or binding as against the corporation."

By subdivision 3 of section 3847 of the New Mexico laws of 1897, the authority to adopt a line of route is expressly placed in the directors of the company that subdivision provides that such company may take, hold and use such property "as its directors may deem necessary."

Independently of that statute, it is well settled that authority to adopt a line is vested only in the directors and that it can be exercised in no other way. It was absolutely essential to appellee's claim of priority that its board of directors should have adopted the controverted line as the permanent location of its road before this suit was brought. See the cases last above cited under this point, and also:

Johnson v. Callery, 184 Pa. St. 145, 39 Atl.
73.

Biles v. Railroad, 5 Wash. 509, 32 Pac. 211.
33 Cyc. L. & P. 137-140.

This fact is emphasized in the New Mexico statutes above quoted and also section 3818, which provides that:

"Directors must perform the duties enjoined upon them by law and the by-laws of the corporation. A majority of the directors shall constitute a board for the transaction of business and every decision of a majority of the directors forming such board, made when duly assembled and in session as such board, shall be valid as a corporate act."

It follows that in the absence of such adoption of the controverted line by resolution of its board of directors as a corporate act, the appellee had no standing to ask any relief, even under its own contention.

Now, what are the facts on this question of adoption?

Appellees sued to protect the entire line from the Colorado boundary to Farmington as a unit. Obviously a break in that line would render all of it useless. A line from the Colorado boundary to Aztec would be of no use or benefit to appellee without the line from there on to Farmington. The court dealt with the entire line as a unit. The decree covers the entire line as a unit. This was necessarily so.

Kansas, etc., R. R. v. Davis, 197 Mo. 669,
95 S. W. 881.

D. & R. G. R. R. v. Alling, 99 U. S. 463.

The facts show that the line from a point a mile and a half north of Aztec to a point seven miles below there, and from Bouseman crossing to Farmington, a distance of over three miles, making a total of ten miles, was not covered by any order of adoption put in evidence (143). All the points of interference and encroachment, except the first two, the Whitney and McEwan crossings, lie on that ten miles of uncovered line (141). The only evidence of any adoption of that ten-mile portion of the line was the oral evidence of the witness McFarland, the engineer, over the objection and exception of appellant, that Exhibits 35 and 36 were copies of maps and profiles presented by him and adopted by appellee's board of directors (143-144).

That oral statement of what the directors did was the only evidence of adoption of this line. It follows that if such oral evidence was incompetent it must be discarded as inadmissible, and in that event nothing remains to support appellee's claim of adoption.

That evidence was clearly incompetent and inadmissible. Section 3832 of the New Mexico compiled laws of 1897 provides that:

"The directors must cause a book to be kept by the secretary to be called, Record of Corporation Debts, in which the secretary shall record all written contracts of the directors, and a succinct statement of the debts of the corporation, the amount thereof and to whom contracted, which book shall at all times be open to inspection by any stockholder or other party in interest. When any contract or debt shall be paid or discharged, the secretary shall make a memorandum thereof in the margin, or in some other convenient place in the record where the same is recorded. They must also cause a complete record to be kept by the secretary, of the proceedings of all meetings of the board of directors and of the stockholders, in a book provided specially for that purpose. Such record must show the name of each director present at the opening of each meeting of the board, and at what stage of the proceedings any director not present at the opening appeared, and also at what stage of the proceedings any director may absent himself on leave or otherwise. The record must also show the name of each director voting against any proposition, whenever any director may require the same to be placed upon the record. Prior to the adjournment of each meeting of the board or of the stockholders, as the case may be, the record of the proceedings of such meeting must be read and approved. The directors must also

cause such other books to be kept by the secretary as may be deemed necessary, or prescribed by the directors, in which all the business transactions of the corporation must be plainly and accurately entered and kept; also a book to be labeled, Book of Stockholders, which shall contain the names of all persons alphabetically arranged, who are, or shall have been, stockholders of the corporation, showing their places of residence, if known, the number of shares of stock held by them, respectively, the time when they, respectively, became the owners of such shares, the amount of cash actually paid to the company by them respectively for their stock, and also the time when they may have ceased to be stockholders; said Book of Stockholders, during the office hours of the secretary, shall be open to the inspection of stockholders and creditors of the corporation and their personal representatives. The directors must also cause to be kept by the secretary a book to be labeled, Transfer Book, in which all transfers of stock must be entered; said Transfer Book shall be received in all courts and places as prima facie evidence of the facts therein stated."

Either appellee's directors passed a resolution adopting this line or they did not. If they did not, then appellee's claim is deprived of every vestage of support. If they did, then that section 3832 required that a resolution should be entered on the records of the meeting showing what directors were present and how they voted. If they passed such a resolution of adoption, it must be assumed and presumed that they obeyed the law and re-

duced it to writing. If they did not do so they disobeyed the express requirement of the law which was part and parcel of appellee's charter and the resolution would be a nullity. There is no suggestion in this case that such record had been made and then lost or destroyed. There is no suggestion that such minute book was not kept as required by law. That record was the best evidence and the only competent evidence of what such directors did. The issue of issues in the case was that adoption—McFarland's evidence was incompetent to prove it. The oral testimony of the witness not only violated the best evidence rule, but involved the conclusion of the witness that the board had been "duly assembled," and was in session as such board and that a quorum was present and his personal construction of what was done. That oral evidence should have been stricken out. It should have been discarded by the court and appellee's claim with it.

Mandel v. Swan Land Co., 154 Ill. 177, 40 N. E. 462.

Corcoran v. Sonora Mining Co., 8 Ida. 651, 71 Pac. 127.

Methodist Chapel Co. v. Herrick, 25 Maine 354.

Haven v. Insane Asylum, 13 N. H. 532.

Union Mining Co. v. Bank, 2 Colo. 565.

Dennis v. Joslin Mfg. Co., 19 R. I. 666, 36 Atl. 129.

Mengis v. Fifth Av. R. R., 30 N. Y. S. 999

Central Elec. Co. v. Sprague Elec. Co., 120 Fed. 925.

Ramsdell v. Rivet Co., 104 Fed. 16.

Beeler v. Highland Co., 54 Pac. 295.

Stock Assn v. West, 76 Tex. 461, 13 S. W 307.

- Nixon v. Goodwin, 85 Pac. 169.
Tobin v. Roaring Creek Co., 86 Fed. 1020.
Swisher v. Fidelity Co., 164 Ill. App. 243.
Trustees v. Shaffer, 63 Ill. 243.
Miller v. Johnson, 72 S. W. 370.
Stevens v. Eden Society, 12 Vt. 686.
Hurd v. Hotchkiss, 72 Conn. 472, 45 Atl. 11.
Bowich v. Miller, 21 Ore. 25, 26 Pac. 861.
Coffin v. Collins, 17 Maine 440.
Bank v. Cutler, 49 Me. 315.
Supreme Lodge K. of P. v. Robbins, 70 Ark
364, 67 S. W. 258.
Pittsburg R. R. v. Clark, 29 Pa. St. 146.
4 Thompson Corporations, Sec. 5175.
6 Thompson Corporations, Sec. 7735.
Hill v. Cleveland, 4 Oh. Dec. 562.
3 Encyc. Ev. 650.

In *Mandel v. Swan Land, etc., Co.*, 154 Ill. 177, 40 N. E. 462, it is held that secondary evidence of the books and papers of a corporation is inadmissible in its behalf, where the originals are under its control. The court says at pages 189-190:

"By section 15 of chapter 57 of the Revised Statutes of Illinois 'the papers, entries and records of any corporation or incorporated association may be proved by a copy thereof, certified under the hand of the secretary, clerk, cashier or keeper of the same. If the corporation or incorporated association has a seal, the same shall be affixed to such certificate.' By section 18 of the same chapter it is provided that 'any such papers, entries, records and ordinances may be proved by copies, examined and sworn

to by credible witnesses.' In addition to the evidence authorized by the statutes, the original books would be admissible, and in case of loss or destruction the contents might be proven, and under certain circumstances, where there is an omission to make any record on the subject, parol evidence may be heard (*Ratcliffe v. Teters*, 27 Ohio St. 66; *Bank of United States v. Dandridge*, 12 Wheat. 64). The original books, and the evidence provided by sections 15 and 18 of the statute, are original evidence, and evidence of a secondary nature is not to be resorted to where there is in the possession of a party evidence of a higher and more satisfactory character. Proof of the papers, entries and records of a private corporation in possession of that corporation cannot be shown by an opinion or conclusion of a witness. The evidence must be primary, original evidence."

In *Corcoran v. Sonora Mining, etc., Co.*, 8 Ida. 651, 71 Pac. 127, it is held that oral evidence is not admissible to prove the records of a corporation in a suit brought to set aside a sale of stock of a stockholder for non-payment of assessments. The court says:

"Inasmuch as boards of directors act by resolution, and the statute requires them to keep a record of their proceedings, we do not see how it can well be at all contended that a resolution levying an assessment need not be recorded in the record book of the corporation; and we do not think that a mere recital of the fact that such assessment was levied—a con-

clusion of fact—can be held to answer the requirements of the statute.”

In *Methodist Chapel Corporation v. Herrick*, 25 Maine 354, it is held that where a corporation brings a bill in equity, and alleges therein that certain acts were done by committees thereof, whereby a resulting trust in certain land, conveyed to a third party, was raised in favor of the corporation, it cannot prove the authority of the committees to act therefor by parol evidence; their power to act can be shown only by its records. The Court says at page 358:

“The evidence introduced by the plaintiffs, if competent, establishes substantially, the allegations in the bill; and it is unnecessary to indicate, what should be the effect of the facts disclosed, if the court could with propriety give them consideration; we think much of the testimony is inadmissible as proof; the Methodist Chapel Corporation is alleged to have been duly organized; all the purchases, negotiations and payments relied upon by the plaintiffs to show a resulting trust for them, were made, as the bill alleges and as the depositions show, by committees of the corporation. Without competent evidence of the authority of these committees to act in behalf of the corporation, the foundation of their suit fails; being a corporation, they can act only as corporations, and their doings can be shown only by their records, which are presumed to be made and preserved; parol evidence cannot be admitted.”

In *Union Gold Mining Co. v. Rocky Mountain National Bank*, 2 Colo. 565, it is held:

"1. Oral evidence of the proceedings of a corporation meeting, of which a record is shown to be in existence, is inadmissible; to the introduction of such record, it must be shown that the entries were made by the proper officer; and generally speaking, this officer must himself be produced, or if he is dead, his handwriting must be proven; testimony of a stockholder that he was present at the meeting and that the paper produced is a correct record of the proceedings, does not render the paper admissible.

"2. When a corporation relies upon its own record, strict proof of its authenticity is required."

At pages 574 and 575 the Court says:

"The minutes of proceedings of two meetings of the board of directors, and one meeting of the stockholders of appellant, offered in evidence upon the trial below, and excluded by the court, were not shown to have been made by the proper officer of the company; the president of the corporation testified that he was present at the meetings and that the record was correct, but the secretary, by whom the minutes were kept, was not called, nor was his absence explained. Whether all of the facts recited in the minutes might be proved by the books of the corporation, is a question of some difficulty, which it is not necessary to discuss; the most important of those facts was the rejection of appellee's demand and the disavowal of

Sabin's agency, which is alleged to have occurred at a meeting of the stockholders, held April 5, 1869; that such rejection and disavowal is a corporate act, of which the record would be the best memorial, is plain enough; and, therefore, oral evidence as to the proceedings of that meeting was properly excluded. Angell & Ames on Corporations, section 679. But proof that the book was kept by the corporation as a record of its proceedings, was not a sufficient authentication without further evidence to show that the entries were made by the proper officer. *Whitman v. Granite Church*, 24 Me. 236. Generally, it appears to be necessary to call the clerk or officer who made the entries, if he is living, and, if he is dead, to prove his handwriting. *Stebbins v. Merrill*, 10 Cush. 27, and *Union Bank v. Knapp*, 3 Pick. 196. Obviously a corporation, relying upon its own record to establish its acts, with all the evidence of correctness at its command, should be held to strict proof, and that offered by appellant was clearly insufficient; another reason for rejecting the proceedings of April 5, 1869, is that the affairs of the corporation were in the hands of trustees, or directors, and the stockholders had no authority on the premises. *Gashwiler v. Willis*, 33 Cal. 12."

In *Dennis v. Joslin Mfg. Co., et al.*, 19 R. I. 666, 36 Atl. 129, it is held that the best evidence of the vote of a corporation is the recorded action of its stockholders or officers, although this is not conclusive against a

stranger or against a stockholder in an individual transaction between him and the corporation. The declaration of a dividend is one of the most important acts of a corporation, implying corporate action to that effect, and ought to appear on the books of the company. Parol evidence is inadmissible to prove a vote of a corporation declaring a dividend; in case of error the remedy should be by a proceeding to correct the corporation records.

In *Ramsdell v. Rivet and Novelty Co.*, 104 Fed. 16, it is held that under Code W. Va. c. 53, Sec. 52, which requires corporations to keep records of their proceedings, the records of a corporation of that state constitute the best evidence of facts which should be shown thereby, such as the names of incorporators and officers, the action taken at meetings, etc. The Court says:

"This case is now heard upon exception to the master's report. The first exception taken by the plaintiff to the report insists that there is no evidence to sustain the conclusion of the master that the corporation was organized on the 5th day of October, 1891. The certificate of incorporation was issued by the secretary of state of West Virginia on the 11th day of September, 1891, and the evidence of H. B. Haigh, at page 2 of the defendants' depositions, shows that on the 28th day of September, 1891, special notice was given by a majority of the incorporators, by publication in the New York Evening Post, of a 'meeting of the stockholders of the National Rivet and Novelty Company at the office of Ernest C. Webb, 181 Broadway, New York City, on October 5th, 1891, at 4 o'clock p. m., for the purpose of electing a board of directors, making and adopting by-

laws, and transacting any other business which may be lawfully done in general meeting.' The witness testified that that meeting was held, and that there were present a majority of the incorporators of the defendant company, and that there was an election of officers for the company. There is an exception to this finding of the master, and I presume the exception is founded upon the fact that there were no records or minutes of any character produced before the master for the purpose of showing what transpired at that meeting. As to the fact that the meeting was held, I do not deem it important that the records of what transpired at the meeting should be produced. That is an independent fact, which may be proven by any witness who was present (that the meeting was held), but what transpired at that meeting, or after the organization of the company, should be a matter of record as provided for in section 52, c. 53, of the Code of West Virginia."

In *Beeler v. Highland University Co.*, 54 Pac. 295, it is held that any act of a corporation, which must necessarily be performed by its board of trustees duly organized, and a record thereof kept, cannot be proven by parol evidence, in the absence of any proof of the non-existence of such record, or that such record, if any exists, is inaccessible to the party offering such proof. The Court says at page 298:

"For the apparent purpose of attempting to show that the college had so far performed the conditions upon which Johnson had agreed to pay interest on \$10,000, and upon rebuttal,

the plaintiff propounded to the witness Brown this question: 'Do you know whether the presbytery of Highland approved the act of the legislature in transferring the control of Highland University to the synod of the old Presbyterian church of Kansas? Do you know whether the presbytery took any action on it? This was objected to, as being incompetent and calling for a conclusion of the witness. The presbytery could only take action, as we all must know, in the ordinary mode by which a body of men assembled officially act. If there was no record of such action retained, then secondary evidence might be resorted to; but it was incompetent to show by oral testimony what the presbytery had done without first showing that its action had not been recorded, or that the record was inaccessible to the plaintiff. Again, it was asked of this witness: 'After the action of the presbytery, will ask you whether the synod of the old school of the Presbyterian church of Kansas took charge of Highland University?' This could only be done by act of the body of the presbytery assembled in the usual course, which must necessarily have been evidenced by writing of some character. It was objected to as being incompetent and being founded upon evidence which had not been introduced. This objection was overruled, and the question answered 'They did.' Then followed the question: 'Do you know whether they took charge or not with the consent of the presbytery at Highland?' This was objected to, as being incompetent evidence,

which objection was overruled, and excepted to by the defendants. The answer was 'Yes.' Then followed the question: 'Did they take charge by consent of the presbytery at Highland?' This was objected to by the defendants as being incompetent and not the best evidence. This objection was overruled, and excepted to by the defendants, and the question was answered, 'Yes.' The presbytery at Highland could only consent by action taken at a meeting of that body, evidenced by a record of their action."

In *Stock Assn. v. West*, 76 Texas 461, 13 S. W. 307, it is held that in a suit by a corporation against one of its members to collect an assessment made under its charter, it must be shown by competent evidence that the assessment was made. Article 586, Revised Statutes, requires corporations to keep a record of their business transactions, of which action copies authenticated by the president and secretary under the seal of the corporation are evidence. It is incompetent to prove by parol the records of a corporation without showing the loss of the original record or otherwise accounting for the absence of such original. The Court says at page 462:

"On the trial plaintiff offered to prove by the deposition of Mugge that the assesment was made by authority of an order of the board of directors, made at a meeting of the board on the 26th day of August, 1884. The evidence was objected to upon the ground that it was 'secondary and not the best evidence.' The

objection was sustained, and this ruling is assigned as error.

"Article 586 of the Revised Statutes requires corporations to keep a record of all business transactions, and Article 601 makes such records, or copies thereof authenticated by the signatures of the president and secretary under the seal of the corporation, competent evidence in any action or proceeding to which such corporation may be a party. To fix defendant's liability, plaintiff must have shown that the assessment was made, the best evidence of which was the record of the order or resolution of the board of directors. It is a familiar rule governing the production of evidence that the best evidence of which the case in its nature is susceptible must be produced, and none other can be received, if objected to, until the non-production of the best is accounted for. There was no attempt to show that the records of the corporation had been destroyed, or to explain any other way the non-production of the primary evidence as a predicate for the introduction of the secondary evidence offered, and we think the court did not err in excluding it."

In *Nixon v. Goodwin*, 85 Pac. 169, it was held by the California Court of Appeals that recitals of the minutes of a meeting of a corporate board of directors cannot be proved by parol. The Court says at 175:

"The minutes of the board of directors at that meeting were not produced, and not even an extract of the minutes of that meeting

was offered. That was a very important meeting and lasted two days. The president resigned and a new one was elected. Appellant was present and the minutes, if properly kept, disclosed the action taken by him. Whatever may have been the reason for omitting the introduction of the minutes of that meeting, its proper recitals could not be proved by an oral statement."

In *Haven v. Insane Asylum*, 13 N. H. 532, a suit against a corporation to recover expenses incurred by the plaintiff while employed in the service of the corporation, it appeared from his evidence that he appointed an agent of the corporation by a vote of the trustees, and that there were records of the corporation; no notice was given the corporation to produce the records. Held, that parol evidence of the vote was inadmissible. The Court says:

"It is very probable, from the testimony of Mr. Coues, that a record was made of the appointment of the plaintiff as an agent of the asylum, and it is certainly to be implied that the corporation kept records of their doings. The rule then applies, that the best evidence must be given of which the nature of the thing is capable; that no evidence shall be given which supposes still greater evidence behind in the party's possession or power; and if, in the course of a trial, it appear, either upon direct or cross-examination of the witnesses, that written evidence exists of the facts sought to be proved by parol, the parol evidence will be

laid out of the case. *Rex. v. The Inhabitants of Padstow*, 4 B. & Ad. 208.

"If in a suit against a corporation it be desired to prove the acts of the defendant, its records, which are usually kept, are the best evidence, and should be produced. *Owings v. Speed*, 5 Wheaton 424; 3 Johns 226; 10 Johns 154. The testimony of an officer cannot be received, to show what the votes are, or the authority conferred by them. *Lumbard v. Aldrich*, 8 N. Y. 31. And if the plaintiff desired to prove any facts which appeared of record, he should have notified the corporation to produce the books; and if they had not been produced he might then have given parol evidence of the votes of the trustees. *Thayer v. Middlesex Mutual Ins. Co.*, 10 Pick. 326. The depositions were, therefore, incompetent."

In *Pittsburgh, etc., R. R. Co. v. Clarke*, 29 Pa. St. 146, it is held: A transfer of stock by a person indebted, without the action of the board of directors, is a nullity; and such consent must be evidenced by a recorded resolution of the board, and cannot be proved by parol, unless the written minute has been lost or destroyed. In ordinary transactions between a corporation and strangers, the authority of agents, and the existence of contracts, may be implied from circumstances, or where the assent of the board is required by a by-law; but where the charter grants a power, the mode prescribed for its exercise must be strictly pursued. The Court says at pages 151 and 152:

"The consent of the board of directors is in itself the originating act in the change of

title, and does not merely operate to perfect the conveyance previously begun: *Marlborough Mfg. Co. v. Smith*, 2 Conn. Rep. 579; *Newton v. Bridgeport Turnpike Co.*, 3 Conn. Rep. 544; *Oxford Turnpike Co. v. Bunnell*, 6 Conn. 552. So long as the stock remains unpaid, the corporation has a right to refuse to receive new members in place of the original adventurers. Until the stock is fully paid up, and the stockholders otherwise free from debt to the company, they have no right whatever to introduce strangers into the company in their places; a right which depends upon the consent of others is no right at all; the transfer to Mr. Stanton was therefore of itself a nullity. An attempt was made to give it vitality by parol evidence from which the consent of the board of directors was to be inferred by the jury; but there is no evidence tending to show that the question was ever presented to the consideration of the board, or that any action was taken by the board in regard to the transfer; in ordinary business transactions between a corporation and strangers, the authority of agents and the existence of contracts may be implied from acquiescence and other circumstances; so, where the assent of the board is required by a by-law only, the execution of the by-law may be modified by the practice of the corporation. *Ins. Co. v. Smith*, 1 Jones 126. But where the act of incorporation grants a power, the mode prescribed by the statute for its exercise must be strictly pursued. 5 Barb. Sup. Court Rep. 649; 2 Cranch 127. The

question here is, whether one member of a corporation has been legally substituted for another; the title of the original stockholder was established by written evidence; and could have no legal existence without it. *Thames Tunnel v. Sheldon*, 6 B. & Cress. 341. The title of the substitute must be shown by evidence of the same character; it is the duty of the directors to keep minutes of their proceedings, and the proper evidence of their assent to a transfer is a recorded resolution, adopted when the board was in session; where the transfer is made by a director, it ought further to appear that the resolution of assent was carried without his vote; if the resolution was adopted and entered on the minutes, the loss or destruction of the entry might be supplied by parol proof; but in no other case can parol evidence be received to show that an assignee has been admitted as a member of the corporation, in the place of the assignor; there was no legal evidence of the assent of the board of directors to the transfer, and therefore no legal evidence of a valid transfer of the stock."

In *Hurd et al. v. Hotchkiss*, 72 Conn. 472; 45 Atl. 11, it is held that the recorded vote of the directors of a corporation is the only proper evidence of their acts as such. The Court says at pp. 479-80:

"John Hurd was a witness and was asked this question: 'State whether or not at that first meeting of the board of directors (i. e. directors of the St. Regis River Lumber Company), they didn't authorize you to manage the

affairs of the company, make contracts to bind it, and generally to conduct its business?' This question was objected to and ruled out. This ruling was correct. The question in form required the witness to declare whether or not the directors of the St. Regis River Lumber Company had done a certain act. The act of the directors of a corporation can be shown only by their recorded vote. *Savings Bank v. Davis*, 8 Conn. 191. If there had ever been a vote of those directors authorizing Mr. Hurd to manage its affairs, then the vote should have been produced. If such a vote had once existed and had been lost, then its terms might perhaps have been proved by oral testimony. But the question asked was not adapted for any such purpose."

In *Stevens v. Eden Meetinghouse Society*, 12 Vt. 686, it is held that warnings and proceedings of meetings of an incorporation, having a clerk, and whose by-laws require the warnings to be in writing cannot be proved by parol. The Court says at page 686:

"A corporation and every member thereof, is bound by a vote of the majority present at a meeting, warned agreeably to the laws of the corporation, and not otherwise; if no provision is made for such warning, every member must have personal notice; here the clerk was authorized to warn a meeting by posting up a written notice; no other mode of calling a meeting could be shown and most clearly this could not be proved by parol, until the loss of the notification was first proved;

but this was not attempted; here was an attempt to add to the records by parol whole warnings, meetings and votes; this is clearly inadmissible and the fact that no record of meetings after 1836 appeared on the books does not authorize this; the want of such record only shows that no such meeting was held; if it be asked what is to be done by third persons, if a corporation will not record its appointments and votes the answer is, refuse to recognize or act on any such assumed authority or unrecorded votes, or hold them personally liable who misrepresent their authority."

The finding of adoption by the District Court was based solely on this incompetent testimony. That evidence and finding must, therefore, be discarded. Consequently appellee failed to show any adoption of its line and was not entitled to any relief in this suit.

POINT II.

There was no appropriation of the land till appellee's location map was filed which was not done until after this suit was started.

All the authorities hold that there is no completed location of a line until the corporation is concluded in its election. And before the property is considered as appropriated the company must have done every act necessary to enable it to condemn the line.

2 Lewis Em. Do. (3d Ed.) Sec. 503, p. 904.
Sioux City Land Co. v. Griffey, 143 U. S.

32, 39.

Tarpey v. Madsen, 178 U. S. 215, 229.

Section 3850 of the New Mexico laws of 1897 provides that a petition for condemnation sets forth "that the company has surveyed the line or route of its proposed road, and made a map or survey thereof, and that they have located their said road according to such survey."

Section 3874 provides that :

"Every corporation formed under this act within a reasonable time after its road shall have been finally located, must cause a map and and profile thereof, and of the lands required and taken for the use thereof, and the boundaries of the several counties through which the same may run, to be made, and file the same in the office of the secretary of this territory; and also similar maps of the parts thereof located in different counties, and file the same in the office of the clerk of the county in which such parts of the road shall be situated, there to remain on record forever. In case the line of the road be changed at any time, as in this act provided, similar maps of the new line must be made and filed, as aforesaid. Said maps and profiles must be certified by the chief engineer of the corporation, and copies of the same, so filed and certified, must be kept in the office of the secretary of the corporation, subject to examination by all persons interested. Copies of such maps and profiles, certified by the secretary of this territory, shall be received as prima facie evidence of what they contain, in all courts and places within this territory."

It is clear from those statutes that a company is given a reasonable time after the location of its road to make a map thereof. But once that map is made it should be filed forthwith because there would be absolutely no reason for any delay. The map must have been made before the company could condemn, consequently the two sections should be construed together and held to require the filing of the map as a prerequisite to a completed appropriation.

Many other reasons suggest the reasonableness of that construction. Until such map is filed the company is not concluded in its location. Until that time its action is a secret locked in the breasts of its own officers. Any other rule opens the door to uncertainty and enables the company by excuses of all sorts based on fugitive and variable oral testimony to claim the establishment of a clamp on the land. Until that map is filed neither the state nor the public can know anything about the determination of the company, its route cannot be pre-empted until the map is filed as a notice to others of the adoption of the line. If a secret location can appropriate a man's land and prevent him from passing good title to another, then such embargo on the *jus disponendi* detracts from the efficiency of his estate in the land and takes therefrom a valuable element, viz.: the power to sell it to whom he pleases. Hence the effect of that embargo upon him is directly repugnant to the constitutional inhibitions against taking property without just compensation and without due process of law. If he cannot find a purchaser during the continuance of such embargo, of what avail is his estate?

The location map was not filed by appellee till May 13, 1905 (146-84), one day after this suit was brought (2-16) and months after appellant had begun

work (88). Hence there was no completed location when this suit was instituted.

White River R. R. v. Telegraph Co. (Ark.),
98 S. W. 721.

Biles v. Railroad, 5 Wash. 509; 32 Pac. 211.

So. Indiana R. R. v. Indianapolis R. R., 168
Ind. 360.

Sioux City Land Co. v. Griffey, 143 U. S.
32-39.

Tarpey v. Madsen, 178 U. S. 215, 228, 229.

Thus in *So. Indiana R. R. v. Indianapolis R. R.*,
168 Ind. 360, the Court says and holds:

"There must be some step taken which amounts to a legal location of its line, for railway purposes, before a company can insist that for many miles ahead of its actual use and occupancy its real estate is not subject, under the general statute, to appropriation by another company. * * * The law under which each of the railroad corporations in question was incorporated only requires that the articles of incorporation should designate the termini of the road, and the counties through or into which it would pass. There was, therefore, no grant to either of them of a specific right of way, and any conflict arising between them must be solved by priority of location. This can be accomplished, not by ordinary acts *in pais*, but by some public act, which can be said, in a way at least, to commit the company, as between it and the state, to a definite location."

And speaking of recorded options taken the court there says at page 374:

"No doubt these deeds were notice of a legal holding, but they did not constitute a legal location."

Mr. Justice Brewer says in *Sioux City Land Co. v. Griffey*, 143 U. S. 32, at page 39:

"Only when by filing its map it has communicated to the government knowledge of its selected line, is it concluded by its action."

The facts here do not show a single circumstance existing when the suit was begun, which as between it and the territory, had committed appellee to the line in controversy. Hence there had been no completed appropriation of the property.

POINT III.

Whatever rights appellee may have had originally it has lost by its laches and inability to construct its line.

Appellee appealed to a court of equity, which always discountenances laches and neglect and lends its aid to the vigilant, not the sleeping.

The doctrine that priority of location and adoption of a railroad route confers priority of right to use the ground covered thereby does not confer a perpetual right but is a protection for a reasonable time only. Every case recognizing the principle of such priority conditions its allowance upon the claimant's having prosecuted its enterprise in good faith and having proceeded with reasonable diligence in the construction of the road. The rule is perhaps the most tersely expressed in

Milwaukee R. Co. v. Milwaukee R. Co., 132 Wis. 313, where the Court says of such a location of a route, that:

"It is plain, however, that it must be a determination made with the present intention in good faith to locate the line upon that route and construct the same with reasonable diligence. It cannot file a mere caveat upon the route and await future developments."

See also 2 Lewis Em. Do. (3rd Ed.),
Sec. 503, p. 908.

The principle somewhat crystallized in the statutes of New Mexico in the compiled laws of 1897, Section 3874 provides that:

"Every corporation formed under this act within a reasonable time after its road shall have been finally located must cause a map and profile thereof, and of the lands required and taken for the use thereof, and the boundaries of the several counties through which the same may run, to be made, and file the same in the office of the secretary of this territory; and also similar maps of the parts thereof located in the different counties, and file the same in the office of the clerk of the county in which such parts of the road shall be situated, there to remain on record forever."

Section 3877 provides that:

"Every corporation formed under this act must commence the construction of its road within two years after the date of the filing of its articles of incorporation in the office of the

secretary of this territory, and must finish and put the same in full operation within six years thereafter or its right to further complete the same, in the discretion of the legislative assembly of this territory may be forfeited."

Twice Congress has passed statutes forfeiting railroad rights of way acquired under the Act of March 3, 1895. (See the Act of June 26, 1906, 34 Stats. 482, and the Act of February 25, 1909, 35 Stat. 647.) Section 4 of the Act of March 3, 1875, (18 Stat. 482) provided:

"That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such incomplete section of said road."

The pendency of this suit would be no protection to appellee against a forfeiture under those statutes.

Columbia Valley R. Co. v. Portland & S. Ry. Co., 162 Fed. 603.

Now what are the facts here on the question of good faith and diligence?

The Supreme Court finds that the only evidence from which an inference in favor of appellee's good faith and intention and ability to construct its proposed railroad line is to be found in the fact that it expended \$113,000 in surveys of its numerous lines of which the portion here in controversy is only a small part (143-144). Upon that fact alone, therefore, must appellee hang its claim to priority.

Now, what of that fact? That money was all spent before the lines were located. That fact does not evidence any ability on appellee's part to construct its line

of railroad. That amount, large as it is, is quite insignificant in comparison with that which would be required for construction purposes. It cost appellant \$830,000 to construct a line only as far as Farmington. It would cost appellee millions to construct a line entirely across the State of New Mexico.

Let us turn to other facts which bear upon this question.

Appellee's survey of the line covered by exhibit 3a was completed on October 21, 1904, was adopted on October 24, 1904, and filed on October 27, 1904. Its survey covered by exhibit 3 was completed on November 19, 1904, was adopted on December 3, 1904, and filed on December 7, 1904. Yet the line in controversy herein, though its survey was completed February 1, 1905, was not filed on until May 13, 1905, a period of over three months after the survey, and over three months after appellant had begun the actual work of constructing its railroad, and one day after this suit was begun. If the other two maps could be prepared and filed in six and eighteen days, respectively, clearly a delay of one hundred and two days in the last instance, unexplained, is unreasonable when it is sought thereby to cut off all intervening equities of appellant. The probability is that the last map would not have been filed until even long after May 13, 1913, had not appellee been quickened into life by the diligent activity of appellant. The failure to file that map until appellant had its forces in the field actually building a railroad and after this suit was begun, is, to say the least, a suspicious circumstance. It certainly is not suggestive of the clean hands required of an applicant for equitable relief. That delay was not in keeping with the mandatory provisions of section 3874 of the New Mexico laws

above quoted. Such delay is in law and in good conscience absolutely fatal to any claim of due diligence in the location of the line claimed by appellee.

So much for the question as to location, let us now direct our inquiries to the intention and diligence of appellee with reference to the construction of its road.

In December, 1904, appellee took options on right of way. They were never recorded (145) and each recited merely that it had been rendered probable that appellee's line might be located over the lands without specifying any particular part thereof, and they were to be effective only in the event that appellee's tracks were finally and permanently located over the lands (145). Appellee did not bind itself to take the land or do anything else in the premises. Its interest did not even rise to the dignity of an inchoate or contingent interest. It was a mere possibility, the materialization or non-materialization of which remained at the absolute and unembarrassed option of appellee. There was no mutuality in the transaction. That at best was a mere undefined and floating right of way which no court of equity would protect.

Goldsboro Lumber Co. v. Hines (N. C.),
35 S. E. 458.

Fox. v. Pierce, 50 Mich. 500.

Moreover, appellee stood by and permitted every one of those options to expire by their express terms early in 1906 (145) except three which contained no express limitation but have certainly expired after the passage of nine years. If appellee intended to or had the ability to construct its road, why did it abandon those options?

When this suit was instituted, appellee had three days prior thereto acquired a right of way on one small tract. It acquired another small tract in June, 1905, one month after this suit was begun. Then stopped. It has done nothing since. It has acquired absolutely no other right of way for this controverted line. Furthermore, it is clear that appellee has never acquired or paid for a single foot of right of way on its lines up the valleys of the San Juan and Chaco rivers or to or beyond Gallegos canon or south of Farmington. If it had done so, the fact would undoubtedly have been shown as an evidence of good faith and intention to build a railroad.

Finally appellee's allied Arizona corporation has only built a few miles of road. The Colorado corporation has built none. Appellee itself, although nine years has expired has not moved a foot of earth nor laid a tie or rail. It has a mere naked paper railroad route, an imaginary railroad. It has never initiated the construction of a single mile of road anywhere in the entire Territory of New Mexico. Appellee never contemplated building upon the part of its line in controversy herein until after the construction of a long line of railroad from the base of its supplies (91), but it has never, after all these years of waiting, initiated any construction whatever upon that long line of road (144-145). It could not be seriously urged that this litigation over 25 miles of right of way constituted an obstacle to the building of the remaining 460 miles of road or some part thereof. There was nothing to prevent appellee from building its road from the Arizona boundary across New Mexico through the Gallegos canon to Farmington. Yet appellee has taken no visible step toward the construction of any railroad anywhere in the territory

though nine years have elapsed (144-145). Such a fact dispels many a dream.

By such failure to construct any part of its railroad, appellee has incurred or subjected its rights and even its very life blood, viz.: its franchise, to forfeiture under Section 3877 of the New Mexico laws and under section 4 of the Congressional Act of March 3, 1875. While it is true that only the sovereign could declare and enforce such forfeiture, nevertheless, the fact that appellee has subjected itself to the possibility of its enforcement is the strongest possible evidence of a lack of good faith and intention and ability on the part of appellee.

The decree ousting appellant from the actual operation of a constructed railroad to establish a conjectural priority of a party who has incurred, but thus far has been fortunate enough to escape the enforcement of, a forfeiture of its rights is an anomaly. It puts the shadow above the substance. The real must give way to the imaginary. The public good is the pole star and grand aim of all government. Yet under the decree here appealed from, the present necessities of appellant and the public which it serves and has been serving on this line for over eight years, must yield to remote and conjectural future needs of appellee.

In marked contrast with the leisurely procedure and practical abandonment of its enterprise by appellee is the activity and industry of appellant which made its surveys, built its road and put the same in operation between February and September, 1905, and has operated the line continuously to the present time. The contrast between the two companies needs no further comment.

Whatever priority appellee may have once had it has

lost by its laches and apparent inability to build its road and substantial abandonment of its intention so to do.

N. Y. R. R. v. N. Y. R. R., 11 Abb. N. C.
(N. Y.) 386.

St. Louis R. R. v. Peach Orchard R. R., 42
Ark. 249.

Colorado E. Ry. v. Union Pac. Ry., 41 Fed.
293.

West Va. R. R. v. Belington & N. R. R., 49
S. E. 460 (W. V.).

N. H. Water Co. v. Wallingford, 72 Conn.
293.

It is not possible that under such circumstances appellee can be allowed the equitable relief awarded it by the decree appealed from against this appellant which has given the strongest possible evidence of its good faith and ability by actually constructing and operating its railroad.

POINT IV.

The facts of this controversy do not present a case of irreparable injury cognizable in a court of equity. Appellant had an adequate remedy at law.

It is an elementary, fundamental and guiding rule, as old as the recorded history of the chancery courts of England, that before a complainant is entitled to any relief in a court of equity it must appear that he has no plain and adequate remedy at law. This principle was written into the seventh amendment to the Federal Constitution, and vindicated in section 16 of the Judiciary Act of 1789 (1 Stat. 82) and further crystallized in section 267 of the Federal Judicial Code of March 3, 1911. Those statutes by express terms only apply to the courts

of the United States. Whether a territorial court is a court of the United States, we need not stop to inquire, but certain it is that the organic act creating the Territory of New Mexico in conferring common law and chancery powers on the territorial courts emphasized rather than obliterated the distinction between those powers. The New Mexico laws, section 2685, provide that there is but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs. While that provision changed or abolished distinctions as to the forms of action, it did not attempt to abolish the distinction between law and equity as two systems of substantive jurisprudence, nor the inherent difference between legal and equitable relief, nor the principles by which the rights of the parties are determined. The forms are all that are changed. The two distinct systems of justice still remain though they are administered by the same court, under one system of practice.

Basey v. Gallagher, 20 Wallace 670.

Gould v. Cayuga Bank, 86 N. Y. 75.

Baylies Code Pl. & Pr., (2d Ed.) pp. 8-9.

This is made clear because the Act of Congress of April 7, 1874 (18 Stat. 27) ratified that provision of the New Mexico code only upon the condition:

"That no party has been or shall be deprived of the right of trial by jury in cases cognizable at common law."

That statutory provision is the test of equitable jurisdiction in the territorial courts. It guarantees a trial by jury in all matters not clearly of equitable cognizance. The rule is a constant limitation upon the ex-

ercise of jurisdiction in a particular case. It is axiomatic in its nature, and universal in its application.

Appellee claimed that this case was brought within equitable cognizance (1) to prevent an irreparable injury, and (2) to avoid a multiplicity of suits. Neither ground is tenable.

What is an irreparable injury? It is one so peculiar in its nature that damages as estimated by a jury will not fairly recompense the party.

There is no irreparable injury shown in this case. The right of way involved is only about twenty-five miles long (10). It was alleged in the fourteenth paragraph of the complaint (7-8) and found by the court (91) that along the two lines down the Las Animas valley from the northern boundary of New Mexico to Farmington, the valley is wide, level and open and that there are no canons, defiles, mountain passes, gorges or other places where it would be impossible or difficult or inconvenient to construct another line of railroad, and that there is ample room for the construction of two or more railroads without interference.

The important question in the location of a railroad are grades and curves. As this valley is level, the question of grades becomes unimportant and the question of curvature becomes the controlling factor. An inspection of defendant's exhibits 270 and 270a shows that appellee's line is at best a series of curves upon curves, where as appellant's is almost straight, and is a better indication of the comparative merits of the two lines than any mere words could give. Equity will protect a line only where it appears to be the best one obtainable. The maps conclusively show that appellee's line is not only not the best one obtainable but is positively a bad line.

The Supreme Court finds that at a very slight expense appellee could straighten its line and avoid three curves and have a tangent two and a half miles long and obviate the interference at the first or Whitney crossing but substantially paralleling appellant's line and that the added expense of relocation and construction could readily be ascertained and measured in money (142). Appellant even offered the use of its right of way for that purpose (142). Every principle of law, equity, reason, justice, economy and safety dictates that appellee should so straighten its line and avoid that curvature and interference.

At another point appellee has five curves in three miles, where it could easily parallel appellant's track on a tangent, thereby avoiding those curves and eliminating the Quinn, Hendrickson and Bouseman crossings (142).

Thus by straightening five miles of its line at slight expense appellee would get a better line and four of the seven crossings in controversy would be eliminated.

From the Bouseman crossing to Farmington is five miles. By straightening its line those five miles appellee would easily parallel appellant's line and avoid the Sutherland, McCarthy, Rickett and Miller interferences.

The straightening of ten miles of its line by appellee would give it a better line and dispense with all this controversy.

The Supreme Court finds that appellee could easily parallel appellant's line from above the Whitney or first crossing all the way to Farmington and by so doing appellee would have a line with very much less curvature (142-143). That Court also finds that the cost to appellee of so relocating its line would not exceed \$75 a mile (141) or \$2,100 in all for the entire 28 miles. That Court also finds that the additional expense to appellee

of constructing such a line could be readily ascertained and measured in money (142-143).

Those being the facts, there is no irreparable injury in this case. Considerations of public policy as well as private justice should impel the Court to require appellee to straighten and thereby improve its line and avoid those numerous objectionable curves. Such change involves only a matter of expense, easily ascertained, and even if it were a fact that appellee's right to its surveyed line were prior and appellant had invaded the same, appellee could be fully compensated by damages recoverable in an action at law.

There is no injury complained of by appellee which cannot readily be compensated in damages. There is no reason why damages commensurate with the injury done cannot be recovered at law.

There is no question as to the ability of appellant to make just compensation to appellee. There is neither allegation nor proof of any inability on appellant's part to pay any damages which might possibly be incurred by appellee in consequence of any change in its surveyed line (143).

There was no irreparable injury. Adequate relief might readily be had in a court of law. The injury done appellee, if any, is susceptible of perfect pecuniary compensation, for which appellee may obtain adequate satisfaction in the ordinary course of law. The case presented no ground of equitable interference.

Schurmeier v. St. Paul Ry, 8 Minn. 88.

Canal Co. v. Young, 3 Md. 480.

1 High on Injunctions, (4th Ed.) Sec. 28,
30, 609.

Drake v. Ry. Co., 7 Barb. 508-559.

Johnson v. Mining Co., 157 Fed. 145.

- M. & G. R. R. v. Alabama Mid. R. R., 87
Ala. 520, 6 So. 407.
E. St. L. C. R. R. v. E. St. L. U. R. R., 108
Ill. 265.
Dry Dock R. R. v. N. Y. & H. R. R., 54
Barb. 389.
Highland R. R. v. Birmingham R. R., 93
Ala. 508, 9 So. 568.
Raleigh R. R. v. Glendon R. R., 112 N. C.
661.
Rainey v. Railroad, 15 Fed. 767, 770.

If the Court did not see fit to leave appellee to its action at law, at least, good conscience required that it should promote the ends of justice by assessing appellee's damages and awarding the same in lieu of the decree entered.

- N. Y. City v. Pine, 185 U. S. 93.
St. Paul R. R. v. Telegraph Co., 118 Fed.
497.
O. R. & N. Co. v. McDonald, 112 Pac. 413.
Knoth v. Railroad, (N. Y.) 79 N. E. 1015.
City v. Water Co., 70 Atl. 572.
Mitchell v. Village, 91 Hum. 189.
2 Lewis Em. Do. (3rd Ed.) p. 1614-1615.
Campbell v. R. R., 23 W. Va. 448.
W. & R. R. R. v. Cashie Co., 116 N. C. 924.
K. & A. W. R. R. v. Payne, 49 Fed. 119.
K. & A. W. R. R. v. Payne, 49 Fed. 114.
Coe v. Railroad, 28 N. J. Eq. 27.
Fouche v. Railroad, 84 Ga. 233.
Ivey v. Railroad, 83 Ga. 536.
Menge v. Railroad, 67 Atl. 1028.
Lane v. Railroad, 135 Mich. 70.

No. Pac. R. R. v. St. Paul R. R., 1 A. & E.
Ry. Cas. 15.

Osborn v. Mo. Pac. R. R., 147 U. S. 248.

Those decisions clearly show that courts of equity readily pursue that course when public interests are thereby subserved. That it would subserve the public interest to permit appellant to continue the operation of its railroad either instead of or in addition to that of appellee, if appellee ever builds any, is a fact so obvious as to require no argument for its demonstration. Furthermore that course would obviate the enormous pecuniary loss to appellant of over \$830,000. The prospective use should yield to the more immediate necessity. The decree appealed from operates inequitably and contrary to the real justice of the case.

Considerations of the relative convenience and inconvenience resulting from its decree, the contrast of the benefits and hardships entailed thereby, the balance of convenience, operate with persuasive and compelling force on the conscience of the Court. Those considerations suggest the impropriety of the decree appealed from.

Western R. R. v. Ala. G. T. R. R., 96 Ala.
272.

Appellant's business ought not to be arrested when it could be avoided consistently with all reasonable protection to appellee.

Lewis v. Lumber Co., 99 N. C. 11.

POINT V.

Appellee had an adequate remedy under the condemnation Statutes of New Mexico and that remedy was exclusive.

Under section 3850, and those following it, of the New Mexico laws appellee could take lands for its right of way by the exercise of the power of eminent domain. If appellee had the prior right to take the lands in controversy, it could readily condemn them in the hands of appellant. That was its proper remedy.

If appellee had the prior right to the lands, then appellant acquired them subject to that right of condemnation in favor of appellee. Appellant would be simply in the position of an ordinary land owner.

Morris R. R. v. Blair, 9 N. J. Eq. 635.

So, of a controversy of this carrier it is said in 2 Elliott on Railroads (2 ed.) section 927 that:

"The first company in such case, it has been held, can condemn the right of way in the hands of the purchasing company in the same manner that it might have condemned it in the hands of the original owners."

That being true, appellee had an adequate remedy at law under the eminent domain statutes. Thus in a similar case, N. Y. R. R. v. N. Y. R. R., 11 Abb. N. C. 386, the court so held.

Furthermore, section 5 of chapter 97 of the New Mexico session laws of 1905 expressly authorized appellee to make itself a party to the condemnation suits started by appellant, and section 13 empowered the court as to conflicting locations:

"1. To regulate and determine the place and manner of making connections and crossings or of enjoying the common use mentioned in the foregoing section:

2. To hear and determine all adverse or conflicting claims to the property sought to be condemned and to the damages therefor.

3. *To determine the respective rights of the different parties seeking to condemn the same property."*

That statute afforded to appellee a full opportunity and a perfect method of asserting and protecting at law its rights in the disputed premises as against appellant and of establishing and settling the very questions litigated in the present equity suit.

Not only, therefore, did appellee have a full, complete and adequate remedy at law, but that remedy was exclusive. It is elementary that where a positive statutory remedy exists for the redress of particular grievances, a court of equity will not interfere or assume jurisdiction of the questions involved.

1 High on Injunctions (4 ed.) sec. 29.

This statute of New Mexico of 1905 differentiates this case from every one of those from other states where there was no statute providing the method for determining such conflicting claims.

POINT VI.

There was no ground of equitable interference to avoid a multiplicity of suit.

The principle that equity interferes to prevent repeated attempts to litigate the same right operates (1)

to prevent the vexatious recurrence of litigation by a numerous class insisting upon the same right, or (2) to prevent the same individual from reiterating an unsuccessful claim. Even then, it is elementary that a complainant in a bill of peace must first have established his right at law. For a succinct discussion of these principles see:

Bispham's Equity (6 ed.) Sections 415-417.
1 High on Injunctions (3 ed.) Secs. 62-65-698.
1 Pom. Eq. Jur. (2 ed.), Secs. 254-272.

The mere statement of the rule shows that this case does not fall within the principle. There was no intention or purpose on appellant's part to institute any action or suit against appellee in the premises. Indeed one of appellee's grounds of complaint was that appellant had not done so and had not even made appellee a party to condemnation proceedings commenced by appellant (14-15). Such proceedings by appellant against other parties could not bind appellee in any way or affect its rights in the premises. Furthermore, appellee could have intervened in such proceedings or could have started one proceeding of its own covering all the points of interference. Clearly the case was not cognizable in equity on this ground.

Eureka & K. R. R. v. California & N. Ry, 109
Fed. 509.
Columbia Valley R. R. v. Portland & S. Ry,
162 Fed. 603-611.
Minneapolis etc. R. R. v. Chicago etc. R. R.,
116 Iowa 681; 88 N. W. 1082.

POINT VII.

Appellee had an adequate remedy at law by ejectment.

All the powers vested in railroad companies to construct and operate their lines, enter upon lands and make surveys and acquire their rights of way, in the exercise of the power of eminent domain, are of statutory creation. The rights thereby conferred are purely legal rights.

Plaintiff has never been in possession of the claimed right of way. The court below in its findings does not declare that such possession ever existed. This is a fatal defect in appellee's case. Without possession, wrongfully interfered with, there was no possible ground upon which to invoke the jurisdiction of a court of equity.

On the other hand, the facts show that before this suit was begun appellant had entered upon the right of way and actually begun the construction of its road.

Under these circumstances appellee had an adequate remedy at law. Appellee claimed under a statute. The papers to support its claim were readily accessible to it. They were in its own possession. The facts upon which the relative rights of the parties rested could readily be shown in a court of law, and effectively maintained before a court and jury. Appellee had not established its title at law and no action looking to that end was pending. The case presented purely a contest of conflicting legal rights. There were no obstacles to prevent a resort to an action at law to pass upon the disputed title. The case presents issues of fact which should have been tried by a jury. It is not the province of a court of equity to try out the question of such disputed right to possession. This was not a bill for the purpose of preserving the

land in its then condition free from injury, until the title could be determined at law, but its purpose was wholly to have a court of equity determine the right to possession. Appellee had a legal remedy by ejectment, by condemnation, or by trespass and for damages. Appellee should have been left to its remedy at law.

Columbia V. R. R. v. Portland & S. Ry, 162
Fed. 603-610.

Kanawha R. R. v. Glen R. R., 45 W. Va. 119-
125.

Highland R. R. v. Birmingham R. R. 93 Ala.
505.

Morris & E. R. R. v. Blair, 9 N. J. Eq. 635.
Thompson v. Railroad, 6 Wall. 134.

Smyth v. Canal Co., 141 U. S. 656.

Hipp v. Babin, 19 How. 271.

No. Shore R. R. v. Pa. R. R., 193 Pa. St. 641.
W. & I. R. R. v. C. d'Almeida R. R., 2 Ida.
580; 21 Pac. 562.

Toledo R. R. v. St. Louis R. R., 208 Ill. 623.
D. & B. R. R. v. Oakland R. R., 131 Mich.
663.

Canal Co. v. Young, 3 Md. 480.

1 High Inj. (4 ed) Sec. 609.

A. & C. R. R. v. J. G. & A. R. R., 82 Ala. 297.

T. & C. R. R. v. E. Ala. R. R., 75 Ala. 576.

M. & G. R. R. v. Ala. Mid. R. R., 87 Ala. 520.

Johnston v. Mining Co., 157 Fed. 145.

Booker v. Browning, 169 Pa. St. 18.

St. L., K. C. & C. R. R. v. Dewees, 23 Fed. 691.

In 1 Pomeroy's Eq. Jur. (2nd Ed.), Sec. 252, pp.
330-1, it is said:

"If the plaintiff's title to the subject-matter, affected by the wrong, is admitted, a court of equity will exercise its jurisdiction at once, and will grant full relief to the plaintiff without compelling him to resort to a prior action at law. Whenever plaintiff's title is *disputed*, the rule is settled that he must in general procure his title to be determined by at least one verdict in his favor, by at least one successful trial at law before a court of equity will interfere; but the rule no longer requires any particular number of actions or trials. The reason for this requisite is that courts of equity will not in general try disputed legal titles to land."

In High on Injunctions (3d ed.), Sec. 8, pp. 8-9, it is said:

"The writ of injunction, being largely a preventive remedy, will not ordinarily be granted where the parties are in dispute concerning their legal rights, *until the right is established at law*. And if the right for which protection is sought is dependent upon *disputed* questions of law which have never been settled by the courts of the state, and concerning which there is an actual and existing dispute, equity will withhold relief until the questions of law have been determined by the proper courts."

Ibidem, Sec. 698, p. 537:

"To warrant the relief in this class of cases the party aggrieved must show a satisfactory title to the *locus in quo*, and, *if the title be denied* or in doubt, the injunction will generally

be refused against a defendant in possession, *until the title is established at law*. But in a strong case of irreparable mischief the rule has been departed from. And where the party aggrieved is *in possession* he will be allowed to restrain such trespasses as would result in irreparable damage in the event of refusing the relief. Equity will not, however, enjoin a trespass to realty *when plaintiff's title is in dispute*, and has not been established at law, when no irreparable injury is shown. And when defendants are in possession, alike with plaintiffs, of the premises in controversy, and the title is doubtful and *disputed*, and it is not shown that plaintiffs have taken any steps to establish their title and no reason is shown why they are not so doing, they will be denied an injunction. In such case a court of equity will not presume to determine the title to property upon affidavits, and will not permit a temporary injunction to be granted which would operate as an action of ejectment."

Ibidem, Sec. 701, p. 541:

"To warrant the interference of equity in restraint of trespass, two conditions must co-exist: *first*, complainant's title must be established; and, *second*, the injury complained of must be irreparable in its nature."

Ibidem, Sec. 715, p. 550:

"Equity will not restrain interference with complainant's possession of his premises when the indirect effect of the injunction would be

to reinstate complainant in possession, the remedy at law being ample."

In Kanawha, etc., R. Co. v. Glen, etc., R. Co., 45 W. Va. 119, 125, the court said:

"Between rival railroad companies the question of priority of location is a legal question to be determined from the evidence and circumstances of the case. *It is one of fact to be inquired into by a jury.* The plaintiff claims the land by deed from the land owner; the defendant from the state by virtue of condemnation proceedings, and is in lawful possession under the order of the condemnatory court. The presumption of right is with the defendant. Under such circumstances the plaintiff is not entitled to an injunction until it has established the supremacy of its claim at law."

In C. & O. R. Co. v. Deep Water Ry. Co., 57 W. Va. 641, 50 S. E. 890, 894, the court said:

"As to what constitutes a location or priority of location between rival railroad companies, there has been no decision by this court. Some observations on that subject were made, in both of what may be termed the majority and minority opinions delivered in the case of Kanawha, etc., Co. v. Glen, etc., Co., 45 W. Va. 119, but the court held that, before the plaintiff could enjoin the rival company, *it must establish its right and title at law*, and, on that ground, the injunction was dissolved and the bill dismissed."

In *St. Louis, etc., R. Co. v. Dewees*, 23 Fed. 691, it was held:

"Where there is a *dispute* as to the possession and right of possession of a railroad track which is not in the actual possession of either party to the controversy, this court will not interfere by injunction."

In *People v. Adirondack Ry. Co.*, 160 N. Y. 225, 247, the court held:

"There is no property in a naked railroad route, existing on paper only, that the state is obliged to pay for when it needs the land covered by that route for a great public purpose."

In *Highland Avenue & Belt Railroad Company v. Birmingham Union Ry. Co.*, 93 Ala. 505-506, 568, the court holds and says at 568:

"The pleadings disclose a controversy as to the title upon which the claim to an injunction is based. That controversy is such as should be determined by a court of law. Conflicting legal rights are asserted. * * * In such circumstances, a court of equity should not interfere by way of an injunction to restrain the commission of an act alleged, on the one hand, to be a trespass, and, on the other hand, claimed apparently in good faith to be a legitimate exercise of a legal right; and the parties should be remitted to their respective remedies at law."

Toledo, etc., R. R. Co. et al. v. St. Louis, etc., R. Co., 208 Ill. 623, it is held that injunction will not

lie at the suit of one railroad company to restrain another railroad company from constructing a railroad upon land in its possession and which it claims by deed, where the only purpose of the bill is to have a court of equity determine the ownership and possession. The court says at 633:

"We are reminded that a court of equity will restrain by injunction the commission of trespasses to real estate which would result in irreparable injury to the owner. Authorities stating that doctrine are not applicable where, as here, defendant is in possession of the real estate, claiming the same under a deed, and where the only acts which complainants seek to enjoin are the construction of a roadbed and laying a railroad track thereon, which is claimed to be an injury to the Toledo Company, for the reason that the proposed roadbed is to be several feet lower than one which it desires to construct upon practically the same line. Such an injury, even if the Toledo Company be the owner of the land over which the road is to be constructed, is one readily adjusted in a suit at law. This is not a bill for the purpose of preserving the real estate in its present condition and free from injury until the title thereto can be determined at law, but its purpose is to have a court of equity determine the ownership and right of possession.

"Counsel for appellants state the gist of this controversy in the following language: 'In the reign of Caesar Augustus, all hightways in the Roman empire led to Rome, and in the

case at bar, all other questions lead up to the important and controlling question, who was the owner of and had right to the strip of right of way in controversy at the time the original bill was filed? The thoroughfare which leads to the solution of this problem passes through a court of law. * * *

* * * * *

"An action of ejectment in a court of law must be resorted to where, as here, the parties desire to contest the validity of conflicting titles. An action of ejectment cannot be tried in a court of equity by bill or cross-bill."

In *Morris & E. R. R. v. Blair*, 9 N. J. Eq. 635, it is squarely held that it would not be in accordance with the practice of a court of equity, upon a mere injunction bill, to investigate and decide the legal title of two railroads, under their charters, to a conflicting route.

In *St. Louis, etc., Railroad v. Dewees*, 23 Fed. 691, it is held that where there is a dispute as to the right of possession of a railroad track which is not in the actual possession of either party to the controversy, equity will not interfere.

In *Booher v. Browning*, 169 Pa. St. 18, the court holds and says:

"Whether the trespass complained of has been committed depends upon the legal rights of the parties. These rights should be determined by law. When so determined an equity based upon them may, if necessary, be asserted, and adequate protection in their enjoyment be secured. It is said in the opinion in *Grubbs*'

Appeal, 90 Pa. 228, that a bill in equity was never intended, nor has it ever been used to settle disputed rights in trespass."

So in *Columbia Valley R. R. Co. v. Portland & S. Ry. Co.*, 162 Fed. 609, affirmed 162 Fed. 603, Judge Hanford says:

"The complainant is not in court asking protection in the actual prosecution of the building of a railroad upon a right of way of which it has taken actual possession. On the contrary, it appears affirmatively by complainant's pleadings that construction has not been commenced and that the defendant is in possession. These facts differentiate the case from *Denver & R. G. R. Co. v. Alling*, 99 U. S. 463. * * *

* The defendant being in possession, if the complainant has the legal title, as it claims, an action of ejectment, in which the parties would have a right to a jury trial, is the proper form of procedure and affords an adequate and complete remedy. *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873; *M. K. & T. Ry. Co. v. Roberts*, 152 U. S. 114, 14 Sup. Ct. 496, 38 L. Ed. 377; *New Mexico v. U. S. Trust Co.*, 172 U. S. 171, 19 Sup. Ct. 128, 43 L. Ed. 407."

As said in *Water Co. v. City*, 213 U. S. 276:

"All these contentions are open in a court of law. It is a guiding rule in equity that in such a case it will not interpose where there is a plain, adequate and complete remedy at law."

The fact that the equity proceeding might be more convenient to appellee than an action at law, might explain but did not justify resort to that mode of proceeding (*Water Co. v. City*, 213 U. S. 276). As said in *Yellow Pine Export Co. v. Sutherland Co.*, 141 Ala. 664, at 667:

"It is not the mission of a court of equity to simplify or make easier the enforcement of a legal right."

The decree appealed from was not justified. In the language of *Hayward v. Andrews*, 106 U. S. 672, at 675 and 676:

"To hold otherwise would be to entarge the jurisdiction of courts of equity to an extent the limits of which could not be recognized, and that in cases where the only matters in controversy would be purely legal rights."

POINT VIII.

Differentiation of Cases.

In the lower court appellee cited a number of cases on the general principle of priority. They had a resemblance to the case at bar in this, that the matter in dispute was a right of way. In every other respect they differ from this case.

The case of *D. & R. G. R. R. v. Alling*, 99 U. S. 463, involved a congressional land grant, and there two forces were in possession, both struggling to maintain the same. This case is distinguished in *Columbia Valley R. R. v. Portland & S. Ry.*, 162 Fed. 603, at 610.

K. C. Ry. v. K. S. Ry., 129 Mo. 62, 31 S. W. 457, did not involve a question of priority, but only one of

abandonment. So did Pittsburg R. R. Co. v. P. C. & St. L. R. R., 28 Atl. 155.

C. R. I. & P. Ry. Co. v. Grimmel, 57 Iowa 482, also only involved a question of forfeiture. This case is distinguished in Minneapolis Ry. v. Chicago R. R., 116 Iowa 681, 88 Mo. 1082.

In Titusville, etc., R. R. v. Warren R. R., 12 Phila. 642, and Williamsport R. R. v. Phila. R. R., 141 Pa. St. 407, the adoption of the line by the directors was conclusively shown, and the complaining companies were in the very act of constructing their roads.

In Sioux City, etc., Ry. Co. v. Chicago, etc., Ry. Co., 27 Fed. 770, the only question involved was one as to the right of *condemnation*. The Chicago Company had surveyed, *duly located*, and was in the *actual construction* of its line across the disputed premises. It had also instituted proceedings according to law to condemn the portion of said premises necessary to the construction of its line as aforesaid. The property in the hands of the then owners was conceded to be subject to condemnation. The Sioux City Company was a competing line and desired to prevent the construction of the rival line. With full knowledge of all the facts just stated, it purchased the entire tract of land from the individual land owner, then undertook by an injunction suit to prevent the Chicago Company from perfecting its title by condemnation, upon the claim that in the hands of a railroad company the property was not subject to condemnation. The court said (p. 777) :

"Under the showing made by the bill and answer, the prior right seems to be with defendant, and under such circumstances it cannot be expected that the court will, by injunction, pre-

vent the company from proceeding with the condemnation of the premises and the construction of its road. It is to the public interest that the construction of both lines should be assured. While each company is entitled to protection in its rights, still neither company should be permitted to interfere unnecessarily with the construction of the other line. The prior location made by the defendant company, in connection with the work and outlay incurred in beginning *the actual construction* of the line, gives it the prior right to use so much of the right of way as may be necessary to enable it to construct its road over the selected line; but it does not follow that every other company is to be debarred from using a portion of the general right of way, if the use thereof is essential to the building of the competing line. Cases may arise which would justify equitable interference in the interests of the public, if it should appear that one company was seeking to defeat the construction of the other line by excluding it from using premises not essential to the former. Priority of right does not necessarily mean the right to wholly exclude other companies from the use of a part of the 100 feet, if such use is necessary to insure the building of the other line."

And a preliminary injunction restraining the Chicago Company from proceeding to condemn the property in the hands of the Sioux City Company was dissolved. It seems to us that this authority is in favor of the appellant in the case at bar. On the one hand it

shows that the appellee was not entitled to an injunction against the appellant, restraining it from condemning the property over which it had duly located and was actually constructing its line of road; and on the other hand, the only possible effect this case could have favorable to appellee is that of a persuasive precedent perhaps, to show that if appellee should hereafter attempt to condemn a right of way over appellant's line, appellant could not, if all the other necessary and essential conditions exist, successfully resist such condemnation solely upon the ground that the property had "already been devoted by it to a public use." We submit that these three authorities come very far short of supporting appellee's contention that the mere running and staking of survey lines by its civil engineers constituted "actual construction" so as to give appellant *possessionem pedis*.

Contra *Costa R. R. v. Moss*, 23 Cal. 324, was a regular condemnation proceeding on the law side of the court. Priority of location and appropriation of a railroad line as between two rival railroad companies was not involved, but was, for the purposes of the decision, *conceded* to be in the plaintiff company. The question upon which this case turned was whether or not the plaintiff was really a railroad company and entitled to exercise at all the power of eminent domain given to railroad companies. This question the court found in favor of the plaintiff, closing its decision with the following:

"The next question is, which of these two companies first located their line of railroad in this narrow pass, or at any other place where they interfere with each other? This question we are unable to determine from the record before us; and as the case will have to go back

for a new trial it can be determined by the court below upon such evidence as may be brought before it."

The court does not even undertake to say what was necessary to constitute a location.

The value of the decision, however, is, in the case at bar, that it clearly points out what should have been the procedure by the appellee in the case at bar, to-wit: that if appellee did not choose to institute an appropriate and original action on the law side of the court to establish its title, then it might, *and under the New Mexico statutes should*, intervene in the condemnation proceedings which it states appellant had instituted. In such a proceeding, being on the law side of the court, the question of title and right of possession between the two companies could be properly investigated and appropriately determined.

In *Kushequa R. Co. v. Pittsburg, etc., Ry. Co.*, 53 Atl. 160, the sole controversy was as to which of the contestants should make an overhead crossing. It was *conceded* that the defendant company had the prior right by having legally located and adopted its route at the point of conflict, but in actual construction the plaintiff company reached that point first, and claimed that, because it was "first in construction," the defendant must cross overhead. A preliminary injunction was granted restraining the defendant company from constructing its line across the plaintiff's line; but upon development of the facts *the injunction was dissolved* upon the ground that the defendant company, being prior in right by location and adoption of its route, the plaintiff must, under the statute, cross overhead. It is thus apparent that, in

the Kushequa case the point now under discussion was not involved.

Ohio, etc., R. Co. v. Freedom, etc., Ry. Co., 53 Atl. 773, was a four line *per curiam* decision, deciding nothing. It was a crossing controversy between a railroad company and a street railway company, and the short statement of facts preceding the opinion shows that it involved none of the questions now under consideration.

In D. & R. G. R. Co. v. D. S. P. & P. R. Co., 17 Fed. 867, not one of the points now under consideration was involved. That was a case in which priority of location was not involved, and the sole question was whether a railroad, admittedly junior in right, could demand *joint use* of the track and right of way of the senior company. At page 870, Hallett, J., said:

"What was said by counsel about the hardship that rests upon the defendant company may be entirely correct. I suppose it is. But I think it is not a matter for which the court can give relief by preliminary order. The plaintiff in this action has secured this right of way by going upon it *and building its road*, under the act of Congress, and I think it has a right to defend that right of way against all who may seek to convert it to their own use, until the things mentioned in this act of Congress are shown to exist."

Morris, etc., Co. v. Blair, 9 N. J. Eq. 635, seems to us distinctly in support of appellant's position herein. It seems to us that a mere reading of the syllabus of this case is sufficient to demonstrate how far appellee falls below the standard fixed for the measurement of contested rights in such cases. The court said:

"2. Two railroad companies were incorporated to complete two independent lines across the state. No route was prescribed to either other than the termini. There was no conflict of routes on the face of the charters, and no necessary conflict in carrying out the objects of the charters.

"3. Held, that the prior right attached to the company which first actually *surveyed* and *adopted* a route, and *filed* their survey in the office of the secretary of state.

"4. That, as *no specific route* was granted to either company, a right to no particular place accrued to either until they had selected or determined upon a location. That no importance should be attached to the fact that the charter of one company was passed seven days before that of the other.

"5. The mere experimental surveying of a route will not confer any vested or legal right until it shall have been adopted.

"6. By *adopting and filing* a survey of their route, a company acquires a right to obtain the lands over which it passed, and they cannot be deprived of that right by another company purchasing and taking deeds for those lands, even if made without notice.

"7. Such conveyances could, at most, put the purchasers in the condition of landowners, liable to have their lands taken upon making compensation.

"8. It would not be in accordance with the practice of a court of equity, upon a mere injunction bill, to *investigate and decide the*

legal title of two railroad companies, under their respective charters, to a conflicting route."

New Jersey, etc., Co. v. Commrs., 39 N. J. L. 28, was a regular condemnation proceeding on the law side of the court, seeking to condemn a railroad right of way for street purposes. None of the questions in the case at bar were involved. Legal appropriation and actual occupation by the railroad company was *conceded*, and the sole question was, whether property once devoted to a public use by the construction of a railroad thereon could be taken by condemnation for another public use inconsistent with the first.

In Rochester, etc., R. Co. v. N. Y., etc., R. Co., 110 N. Y. 128, the law of the appropriation of lands for railroad right-of-way purposes was radically different from that fixed by the New Mexico statute; but the facts stated in the opinion show that the plaintiff company had not only perfected its right by a full compliance with the law, but *was in actual possession* of the premises. The defendant, as was done in the Sioux City Ry. case, *supra*, undertook to block the defendant's right by purchasing the entire tract over which the right of way was located, and the New York court held that under such circumstances the defendant took the property burdened with the plaintiff's right of way.

Barre Ry. Co. v. Montpelier, etc., Co., 61 Vt. 1, was a regular condemnation proceeding on the law side of the court. The Vermont statute made the recording of a map, "signed by a majority of the directors" and showing the location of the road, equivalent to initial appropriation of the land as against third parties—and also as against the land owner, subject only to the assessment and payment of damages. The Montpelier Company had taken all these steps, and had instituted

condemnation proceedings to acquire the legal title to the property occupied. It also appears in the printed opinion that the land was actually occupied by its tracks. The Barre Company purchased the property from the land owners, and undertook to deny the right of the Montpelier Company to condemn, and also undertook to dispossess it. The Vermont court held that under such a state of facts, the Montpelier Company had the better right and could not be interfered with by the Barre Company. If this case has any parallelism in law or fact to the case at bar, we think that the appellant stands approximately in the position of the Montpelier Company, and the appellee in that of the Barre Company.

POINT IX.

Conclusion.

A court of equity repels from its precincts remediless the party who has been guilty of conduct such as appellee's. It is contrary to natural justice, as well as the public interests, for appellee to hold a right of way which it has not earned, and which it has let lie idle for nine years, and be permitted to thereby oust appellant, having the ability and will to serve the public and render the service afforded by appellant's constructed road. Appellee never adopted its line. Appellee has been guilty of the grossest laches and want of good faith. Appellee had an adequate and complete remedy at law. There was no injury in this case which could not be compensated in damages.

We respectfully submit that the decree should be reversed.

JOEL F. VAILE,

General Counsel for Appellant.

F. N. CLARK,

R. G. LUCAS,

Of Counsel.

Office of the Clerk, U. S.

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JAMES D. MAHER

CLERK

Brief and Argument In Behalf of Appellee.**IN THE SUPREME COURT OF THE UNITED STATES****OCTOBER TERM 1913****No. 188****THE DENVER AND RIO GRANDE RAIL-
ROAD COMPANY, *Appellant*,****vs.****THE ARIZONA AND COLORADO RAIL-
ROAD COMPANY OF NEW MEXICO,
Appellee.****Appeal from the Supreme Court of the Territory
of New Mexico.****T. B. CATRON,
Santa Fe, N. M.****B. W. RITTER,
Durango, Colo.****Attorneys for Appellee.****CATRON & CATRON,
Santa Fe, N. M.,
Of Counsel for Appellee.**



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IN THE SUPREME COURT OF THE
UNITED STATES.

October Term, 1913.

No. 188.

THE DENVER AND RIO GRANDE RAIL-
ROAD COMPANY, *Appellant*,

VS.

THE ARIZONA AND COLORADO RAIL-
ROAD COMPANY OF NEW MEXICO,
Appellee.

Appeal from the Supreme Court of the Territory
of New Mexico.

BRIEF AND ARGUMENT IN BEHALF OF
APPELLEE.

The statement of the case embraced in appellant's brief on pages 1 down to the end of the third paragraph on page 13, is, in the most part, correct, but in some instances, it is incorrect, and the matters which are incorrect will be embraced in the arguments hereinafter. Appellee in making its arguments will attempt to confine itself to the points made by the appellant in its argument and assumes that any other matter not called to the attention of this court by the appellant, outside of the nine points embraced in the brief on

pages 37 to 98, inclusive, will not be relied upon and will not be necessary to discuss.

Appellee makes the following points in contradistinction to those made by appellant, but in the same order and with reference to the same subject.

POINT I.

"APPELLEE DID ADOPT THE LINE TO PROTECT WHICH THIS SUIT WAS BROUGHT," OR OTHERWISE HAD THE BETTER RIGHT TO THE SAME. THERE WAS NO BREAK IN A CONTINUOUS LINE SURVEYED, LOCATED AND ADOPTED BY APPELLEE FROM THE BOUNDARY OF COLORADO TO FARMINGTON. IF THERE WAS, APPELLANT COULD NOT COMPLAIN IF IT TRESPASSED ON ANY OF THE LINE.

The third finding of facts by the Supreme Court of New Mexico, trying the case, page 84, is:

"That immediately upon its organization as aforesaid the plaintiff company proceeded with the survey and location of a line of railroad down the said Animas Valley between the said points, and laid out, located and marked upon the ground by stakes set in the ground a line of railroad between the said points, to-wit, between the boundary line of the State of Colorado and the Territory of New Mexico, and the town of Farmington, in said Territory of New Mexico,

(3)

and prior to the 1st day of January, 1905, adopted the said line so surveyed, located and marked upon the ground, as the line of the definite location of its railroad between said last mentioned points."

The fourth finding of facts by the Supreme Court of New Mexico, page 84, is:

"That on the 13th day of May, 1905, the plaintiff company filed in the office of the Secretary of the Territory of New Mexico a map and profile of its said line between the boundary of the State of Colorado and the Territory of New Mexico, and the said town of Farmington, and of the land required and taken for the use of such line, and of the boundaries of the several counties through which the same runs, and also filed in the office of the Probate Clerk and Recorder of San Juan County, New Mexico, in which said line of road is situate, a similar map, on the 23rd day of May, 1905; which said line shown on the said map is the same line so located and adopted by plaintiff and claimed by it, and in controversy in this proceeding."

The fifth finding of facts by the Supreme Court of New Mexico, pages 84 and 85, is:

"That on the 27th day of October, 1904, the plaintiff duly filed in the United States land office at Santa Fe, New Mexico, its duly certified map of that portion of the said line north of the town of

Farmington aforesaid, so located and adopted by it, which lies between a point north of and near the town of Aztec in said County of San Juan, and the said boundary between Colorado and New Mexico, which map was duly approved by the Secretary of the Interior on the 1st day of April, 1905; and that no part of the said line of the plaintiff company in controversy in this proceeding and south of the said southern terminus of the said map and plat so filed in the said United States land office passes over or crosses any public land, between the said point and the said town of Farmington."

The sixth finding of facts by the Supreme Court of New Mexico, page 85, is:

"That in connection with the survey, location and adoption of the said line of railroad of the plaintiff company, between the boundary of Colorado and New Mexico, and the town of Farmington aforesaid, and as soon as its said line had been definitely located, the plaintiff company entered into negotiations with the several owners of the lands and premises crossed by said line, for right-of-way, and was able to agree and did agree with substantially all the owners of such lands as to the compensation to be paid by plaintiff company for the taking and occupation of such land by and for the use of the said railroad, and secured from practically all of such others options and agreements in writing authorizing it to enter upon and take such lands for the purpose of construction, operation and

maintenance of the said line of railroad upon payment of the compensation fixed by said several agreements; and *that prior to the time when the defendant company had made any location of its line of road* over any of the lands where a conflict occurs or there is a controversy in this case between plaintiff and defendant, and prior to the time when defendant had acquired or attempted to acquire any rights-of-way across such lands, the plaintiff company had secured from all such owners of such last mentioned lands written agreements or options fixing the compensation to be paid such owners by plaintiff for the taking of such lands, except only in the case of W. H. Whitney and W. W. McEwen; and that in both of the latter cases, the plaintiff company had verbally agreed with the said Whitney and the said McEwen as to the amount of such compensation which they would require for the constructing and maintenance of the said line of railroad of plaintiff across their said lands, and agreements or options in writing embodying such agreement had been drawn up, prepared and signed by the said land owners, but that such written agreements were not delivered to plaintiff company."

Appellant claims in its brief, first point, that appellee had abandoned, apparently, a portion of their proposed line from the Colorado boundary to Farmington. The finding of facts aforesaid certainly shows no abandonment of appellee's line of road between said points.

Sec. 3847 of the Compiled Laws of New Mexico, 1897. Sub-section 17, page 943; which reads as follows:

"To change the line of its road, in whole or in part, whenever a majority of its directors may so determine: *Provided*, No such change shall vary the general route of such road, as described in its articles of incorporation. The land required for such new line may be acquired by contract with the owners thereof, or by condemnation, as provided in this act, as in the case of the original line;"

authorizes, as will be seen, a company to change the line of its road in whole or in part whenever a majority of the directors may so determine: *Provided*, no such change shall vary the general route of such road, as described in its articles of incorporation. The land required for such new line may be acquired by contract with the owners thereof, or by condemnation, as provided in this act, as in the case of the original line. And that is what was probably done at the two points of divergence mentioned in the eleventh additional finding made by the Supreme Court of New Mexico, page 143, one of them being a short distance north of Aztec and the other one at or near the Bouseman crossing. The first divergence existing for about six and one-half or seven miles down the Animas Valley and then uniting and continuing together for a distance of somewhat less than five miles to a point close to the Bouse-

man crossing, where the second divergence takes place and reunites at or near Farmington. It is made to appear by the findings that appellee apparently changed its line at a point about one and one-half miles northeast of Aztec, or, rather, from that point located and adopted a new line diverging from its older line to a distance of six and one-half or seven miles below, towards, Farmington, where the old line and the new line again meet and continue together for about five miles when they again diverge from each other. It appears that the older line was adopted by appellee by resolution given in evidence from its records; and the new line at the point of divergence and reunion, in both places, was adopted by the board of directors, but the act of adoption was not incorporated in the records of the minutes of the appellee company, as the findings do not show *any record* of such adoption. It is stated in the tenth additional finding, page 143:

“The court finds that every order made by plaintiff’s board of directors as to adoption of surveyed lines has been put in evidence, and yet the records do not show any order by that board of the adoption of the line appearing on plaintiff’s exhibits 35 and 36, but that there were two orders of adoption, under dates of October 24, 1904, and December 3, 1904, respectively, of the lines shown on defendant’s exhibits 3a and 3, which are copies of maps filed by plaintiff in the United States Land Office on October 27, 1904.

and December 7, 1904, respectively, and which are hereby adopted as a part of these findings, to be included in the transcript of record upon appeal."

This finding shows that every order made by the appellee's board of directors adopting any surveyed lines had been introduced in evidence, but that the record of appellee's board did not show any order of that board adopting the line appearing on appellee's exhibit 35 and 36; thus establishing positively that there was no adoption by appellee of those two lines, although every order that was made was introduced in evidence. The contention is that those two were inadvertently or by mistake omitted from the record, as it is shown plainly by this finding that they are not in the record, but the proofs taken and the findings show that those locations were actually adopted by the appellant's board of directors; i. e., by parol evidence of McFarland.

The original findings 13 and 14, page 144, show that appellee actually purchased the right-of-way across the lands of Edith B. M. Young and the lands of Julia A. Miller, and received deeds of conveyance for the same which were duly recorded, said lands to be used for the purpose of the said railroad in their right-of-way. It is unnecessary, we think, to say more about the proposition that appellee abandoned any of its land. The statute permits the line on the road's surveys to be changed without changing the general direc-

tion, and, in so doing, one does not abandon its land; but in making a new location for it in the same general direction, does it not do so with all the rights that it acquired and had perfected under its previous location?

The point relied upon by appellant under this head is that the company did not show that by a record entered between the point of divergence and reunion, that the new located land had been adopted, but showed such fact by the testimony of one, McFarland, only, and it claims that the testimony of McFarland was only a conclusion of his own and did not state sufficient facts. The finding of fact on that point, being the twelfth additional finding, does not purport to give the actual testimony of McFarland, but only purports to give the substance or result of it. It does not state that McFarland testified in the language mentioned in that finding, but only to that substantially. If, however, McFarland had testified in the language mentioned in that finding, we insist that the objection that it was a conclusion testified to and not a fact, is not tenable, because in all such cases such testimony is receivable as *prima facie*, if the court so determines and the opposite party must, by means of cross examination, illicit the particular facts within the knowledge of the witness which go to make up the conclusion, if they do so, with such facts as existed, so as to show that such a conclusion could not be reached. It is a matter that can only be taken

advantage of when the witness has been sifted on cross examination and shown that his testimony, or that such facts in his knowledge, do not justify the statements made by him. We insist that the statement or finding of the court in the twelfth additional finding is a mere statement of the court as to what was the result or effect of the testimony of McFarland; that his testimony was legitimate and proper on that point. While the Statutes of New Mexico provide (Sec. 3832, cited in appellant's brief, page 42) that a complete record must be kept by the secretary of the board of all the proceedings of all meetings of the board of directors and its stockholders in a book provided specially for that purpose; such provision is not mandatory but only directory and if anything which was done at a meeting was omitted from the record, it is a matter which can be established by proof *aliunde*. The findings of the court are that all of the records of the company showing the adoption of the definite location of the railroad line, were introduced in evidence, and they do not show that the land in controversy between the first divergence thereof, northeast of Aztec for six and a half or seven miles to where they joined, and from the second divergence at the Bouseman crossing to Farmington, about three miles were adopted by any resolution made a matter of record in the minutes of the company. This we claim was not necessary. The authorities are numerous and practically, we think, with-

out conflict to the effect that where a statute provides that transactions of a board of directors should be made a matter of record in their minutes, still, if omitted, they can be proven by evidence *aliunde*. This is sustained by the following authorities:

Bank of U. S. v. Dandridge, 12 Wheat. 69,
which is the leading case in the United
States on this Subject;

Dillon Municipal Corporations (4th ed.)
Section 300;

Bridgford v. City of Tuscumbia, 16 Fed.
912-13;

Mining Co. v. Anglo-California Bank, 104
U. S. 192;

Allis v. Jones, 45 Fed. 149;

Eureka Co. v. Bailey Co., 11 Wall. 488;

Wharton Evidence, Sec. 663;

Morawetz Corp., Sections 28, 31, 633-635.

Gordon v. City, 41 Pac. 302;

Zalesky v. Iowa S. I. Co., 102 Ia. 514-15;

Beach Priv. Corp., Sec. 295;

City of Troy v. Atchison N. R. Co., 11 Kan.
397;

Pickett v. Abney, 84 Texas 647;

Hutchinson v. Pratt, 11 Vt. 402;

Kelly v. Board of Works, 75 Va. 270, 1;

Higgins v. Reed, 74 Am. Dec. 307;

And there are many other cases to the same effect.

In *Bank v. Dandridge*, 12 Wheat. 69, it is said:

“We do not admit, as a general proposition, that the acts of a corporation, although in all other respects rightly transacted, are invalid, merely from the omission to have them reduced to writing, unless the *statute* creating it makes such writing *indispensable as evidence, or to give them an obligatory force*. If the statute imposes such a restriction, it must be obeyed, if it does not, then it remains for those who assert the doctrine to establish it by the principles of the common law, and by decisive authorities. None such have, in our judgment, been produced.”

See authorities cited in the opinion.

It will be noticed that this was a case wherein the bank was seeking to enforce a right or obligation due to itself and that the omission to make the necessary record was pleaded by the party against whom the bank was seeking relief, and yet, in that case it was held that the bank could prove by parol evidence matters which properly ought to have been made a matter of record.

In *Bridgeford v. City of Tusculumbia*, 16 Fed. 912 and '13, the court cites from *Dill, Mun. Corp.*, Sections 300 and 301, as follows:

“But a distinction has sometimes been drawn between evidence to contradict facts stated on the record and evidence to show facts omitted to be stated upon

the record. Parol evidence of the latter kind is receivable unless the law *expressly and imperatively requires all matter to appear of record, and makes the record the only evidence.*"

In *Allis v. Jones*, 45 Fed. 149, it is said:

"Parol evidence is admissible to prove the action of a board of directors or stockholders where the record fails to state it."

In *Gordon v. City of San Diego*, 41 Pac. 302, it is said:

"Parol evidence is admissible to prove acts omitted from the record, unless the law expressly and imperatively requires all matters to appear of record and *makes the record the only evidence.*"

Citing

Dill. Mun. Corp. (4th Ed.) Sec. 300;
Bank v. Dandridge, 12 Wheat. 64.

In *Zalesky v. Ia. St. Ins. Co.*, 102 Ia. 114-15, it is said:

"Indeed, it has been so often held, that, where no records are kept, or the proceedings are not recorded, parol evidence is admissible to show what was resolved upon, and by what vote it was carried, that it may be said to be the unanimous voice of authority that such proof may be given."

Citing a large number of authorities. Quoting

from Beach on Private Corporations, Section 295, as follows:

"The evidence offered was not only the best of which the case was susceptible; but it was also competent to establish the facts sought to be proved."

In *City of Troy v. Atchison N. R. Co.*, 11 Kans. 397, Justice Brewer in delivering the opinion of the court, said:

"The record is the best evidence of the proceedings of a city council, and yet it is but *evidence*. It may be evidence of such high order that it cannot be contradicted. It may import absolute verity like the records of a court. But nevertheless it exists only as *evidence* of acts done, and not as *the acts* themselves. If it be lost, or destroyed, the rights created, the duties imposed, and the responsibilities assumed, by the acts of the council, are not lost or destroyed. They exist and can be enforced; and all that has resulted is a change in the kind and manner of proof. It was the duty of the register to make and preserve a record of all the proceedings of the council, a duty imposed by the charter of the city. Citing: City Charter; Private Laws 1860, p. 220, Sec. 15. * * * *If the council may not be thwarted by the omission or refusal of its clerk, a fortiori should a stranger dealing with it in good faith, and influenced to a large expenditure on the strength of an actual vote,*

not suffer in consequence of a like omission. It must be borne in mind that there is no attempt to show by parol that something was not done which the record shows was done. Citing Dill. Mun. Corp., Sec. 237. * * * Quoting from Dill., Sec. 238, as follows: Where the records of a municipal corporation have been so carelessly and imperfectly kept as not to show the adoption of a resolution, or other act of the city council, and there is no written evidence in existence, parol testimony may be admitted, e. g., to show that certain work was done by authority of the city, by proving the passage of a resolution of the council, the appointment of a committee to make the expenditure, their report after the work was done, and its adoption by council." And various authorities cited.

It will be noticed that in this case, as well as some others, the court held that not only a private individual or a stranger dealing with a corporation may prove the act which was omitted from the record, but that the corporation itself may prove it, as it says:

"If the council may not be thwarted by the omission or refusal of its clerk, a fortiori should a stranger dealing with it in good faith, and influenced to a large expenditure on the strength of an actual vote, not suffer in consequence of a like omission."

In the Kansas case last cited, the statutes re-

quired the register to make and preserve a record of all the proceedings of the council, but it does not appear that the statute makes such record the *only evidence to prove such proceedings*, nor does the Statute of New Mexico, which has been cited by appellant, make any such provision, i. e., it does not imperatively require the matter to be made of record, or make the record the only evidence of the facts as stated in 12 Wheat. 69.

In *Pickett v. Abney*, 84 Tex. 647, it is said:

“Even in the case of a municipal corporation, matters omitted in the record of its proceedings may be shown by other testimony.”

Citing 1 Dill. Mun. Corp. Sec. 237; *Bank v. Dandridge*, 12 Wheat. 64, and says:

“If the law makes the recorded minutes the only evidence of what occurred, the rule would be different. *The rule as to proceedings and resolutions of private corporations is not more strict.* The records are prima facie evidence of the facts therein stated, and that all things were rightly done. The proof disputing such a record must be convincing and satisfactory.”

In *Hutchinson v. Pratt*, 1 Vt. 421, it appears that the act of incorporation made it the duty of the clerk to keep records of all the proceedings of

the organization and to give copies of the same when required. The court said:

“It might be competent for the defendant to show by parol the proceedings of the meeting. Where there is a record, it cannot be added to or varied by parol, but the record will be deemed to be evidence of all that was done and that nothing more was done. Thus, in the case of *Taylor v. Henry*, 2 Pick. R. 403, which was a dispute between a person claiming to be a town clerk and his predecessor, there was a record showing a meeting, and also a subsequent meeting, but it did not appear that the first was adjourned. Parol proof was not admitted, that the first meeting was adjourned, for that would be adding to and altering the record. But when there is an omission to make records, the rights of other persons, acting under or upon the faith of a vote not recorded, ought not to be prejudiced. And it would seem that the *right in such cases was reciprocal in the corporation and in those who claimed adversely to them.* The reasoning of the court in the case of *Bank of the United States v. Dandridge*, 12 Wheat. R. 64, is to the effect, that, inasmuch, as from the fault of an individual whom they could not coerce, and over whom they had not the physical power to compel him to make his records, the higher proof could not be had, nothing but secondary evidence was left in their power, and they might avail themselves of such proof. The result is that upon either of the grounds mentioned, the evidence to

prove the voting of the tax was proper and sufficient."

In *Kelly v. Board of Public Works*, 75 Va. 271, it is said:

That "as to the first proposition that the board of public works could only speak through its records, we have already intimated our opinion. Such a doctrine may have formerly prevailed. But since the vast extension that has been given to commerce, and since the commercial and manufacturing interests of the world are managed and administered through the agency, for the most part, of corporations, the law has been otherwise, and now a corporation may bind itself in any way that a natural person may bind himself." Citing many authorities.

In *Eureka Co. v. Bailey*, 11 Wall. 488, it was held that no resolution or order in writing was necessary to bind a corporation.

In *Higgins v. Reed*, 74 Am. Dec. 307, it is said:

"We allude to the manner of keeping the records by the school officers—it being shown that they were kept upon separate pieces of paper, some half and some quarter sheets. The law makes it the duty of the secretary of the district to record all the proceedings of the board and of the district meetings, *in separate books to be kept for that purpose*. Now,

it certainly would tend much to the safety and judicious disposition of the school business of each district if this provision was strictly and technically followed—each secretary furnishing himself with good, substantial blank-books in which to record the proceedings. And we may be permitted to say that in a matter of so much importance, and one affecting so many interests, there is entirely too much carelessness in the manner of keeping the records and proceedings. And yet, we are not prepared to say that this requirement is so far mandatory as that all the proceedings of a board of a district would be void because they were not recorded.”

And in a note on page 309, the same volume, it is said:

“As a general rule, the failure or neglect of the proper officer of a corporation to make and keep a record of the acts and resolutions of the corporate body, or of its board of directors, cannot affect the rights of third persons dealing with the corporation.”

Citing a large number of authorities, first among them, *Bank v. Dandridge*, 12 Wheat. 69; *Dill. Mun. Corp. Sec. 300*; and in another note in the same case, it is said:

“In the case of private corporations, this rule applies in all cases; and in the case of public corporations, in all cases

except where the statute imperatively requires all the acts of the governing body to appear of record."

And then quotes from *Bank of U. S. v. Dandridge*, 12 Wheat. 69, the statement of Judge Story, as follows:

"We do not admit, as a general proposition, that the acts of a corporation, although in all other respects rightly transacted, are invalid, merely from the omission to have them reduced to writing, unless the statute creating it makes such writing indispensable as evidence, or to give them an obligatory force. If the statute does not, then *it remains for those who assert the doctrine to establish it by the principles of the common law, and by decisive authorities. None such have, in our judgment, been produced.*"

And then quotes from *Taylor on Corp.* 263, as follows:

"The omission of a school district to make a contract made by its directors a matter of record on its books constitutes no defense in an action against the district upon such contract."

Citing Athearn v. Ind. Dist. of M., 33 Ia. 105.

"Nor is a school election void because the minutes of the proceedings of the taxables did not state everything to have

been done which the law requires to be done."

And also,

Burgess v. Pae, 2 Gill 254;

Bigelow v. State, 25 N. J. L. 301;

also citing, *U. S. v. Fillebrown*, 7 Pet. 28, saying:

"But it is not true that all the acts of a corporation must be established by positive record evidence;" and then states:

"Where the records of a corporation are omitted entirely, or where they are so carelessly or imperfectly kept as not to show the adoption of resolutions or other acts of the corporation, parol evidence may be admitted to show that such resolutions were adopted, or that such acts were done, by the governing body, unless the law or the charter expressly and imperatively requires all matters to appear of record, and makes the record the only evidence."

To this there are a large number of authorities cited to which the attention of the court is called.

Robson vs. C. E. Fenniman Company,
85 Atlantic 356; (N. J.) Page 358:

"As to the method of proof: It appeared that no entry of the proceedings had at the meeting in question was made in the minute book of the company. But the failure on the part of the Secretary of the

board to perform this clerical duty did not operate to nullify the corporate action. Conceding that if the proceedings had been recorded in the minute book, and afterward approved by the Board, that record would be the best evidence of what the transactions were, it does not follow that, in the absence of such record, no other evidence could be resorted to. On the contrary, all that is required to prove such transactions, in the case of a private corporation, is the best evidence available; and so, when no minute proof thereof has been made, parol evidence of parties who were present is receivable for the purpose. *Wells v. Rahway White Rubber Co.* 19 N. J. Eq. 402; *McMichael v. Brennan*, 31 N. J. Eq. 496."

Hughes Mfg. etc., Co. vs. Wilcox, 108 Pac. 871-873; (Calif.)

"It is likewise immaterial that the minutes failed to disclose the action of the board taken in regard to certain matters. At most, the minutes of the proceedings of the board of directors are prima facie evidence only of its acts. In the absence of minute entry of its proceedings they may be proved by parol evidence."

In re Bank of West Superior, 85 N. W. 501-502;

Same case 109 Wis. 672;

"Objection is made that parol evidence was not admissible to prove the acts of the directors. Doubtless, if a written

record was kept of their meeting and action, that would be the best evidence; but, if no record was kept, then parol evidence is as proper to prove such transactions as any other."

Candell vs. Athens Savings Bank, 79 S. E. 776; (Ga.)

The syllabus by the court is as follows:

"Ordinarily the minutes of a corporation show the formal actions of its directors and stockholders, and before parol evidence thereof can be introduced, they should be produced or accounted for. Parol evidence, however, is admissible to prove the unrecorded acts and transactions of corporations, or of their officers or directors. *Bank of Garfield v. Clark*, 138 Ga. 798 (7), 799; 76 S. E. 95; *Fouche v. Bank*, 110 Ga. 827 (6) 850; 36 S. E. 256; *Ten Eyck v. Pontiac, etc. R. Co.*, 74 Mich. 226; 41 N. W. 905; 3 L. R. A. 378; 16 Am. St. Rep. 633; 2 *Thomp. Corp.* (2d Ed.) 1842, 1847. See also *Handley v. Stutz*, 139 U. S. 417; 11 Sup. Ct. 530; 35 L. Ed. 227."

See also:

Flakne vs. Minnesota, etc., Ins. Co., 117 N. W. 785;

Whitlock v. Alexander, 76 S. E. 538; (N. Car.)

Brown v. City of Webster, 88 N. W. 1070;

Same case, 115 Iowa 511.

The requirements of the Statute of New Mexico that the proceedings of a corporation should be made of record is directory and not mandatory.

In *Bladen v. Philadelphia*, 60 Pa. St. 466, affirmed in *Norwegian Street*, 81 Pa. St. 349, it is said:

“It would not, perhaps, be easy to lay down any general rule as to when the provisions of a statute are merely directory, and when mandatory or imperative. Where the words are affirmative, and relative to the manner in which power or jurisdiction vested in a public officer or body is to be exercised, and not to the limits of the power or jurisdiction itself, they may and often have been construed to be directory; but negative words, which go to the power or jurisdiction itself have never that I am aware of, been brought within the category. A clause is directory when the provisions contain mere matter of direction and no more, but not so when they are followed by words of positive prohibition.”

And speaking on the same subject, the court in *Woolridge v. M’Kenna*, 8 Fed. 662, says:

“The Supreme Court of the United States has frequently recognized and enforced these rules in the construction of statutes.”

Citing a number of authorities on page 662, and then states:

“The supreme court of Tennessee has frequently recognized this distinction between mandatory and directory statutes.”

And in *Hurford v. Omaha*, 4 Neb. 350, it is said:

“Where the directions of the statute are given with a view to the proper, or duly and prompt conduct of business merely, the provisions may be generally regarded as directory.”

In *Eustis v. Kidder*, 26 Me. 100, the court said:

“A provision merely directory cannot constitute a part of the contract, which may be enforced should the officers required to perform such duty neglect it.”

Citing *Bank v. Dandridge*, 12 Wheat. 81. This was where a selectman failed to endorse the bond of a constable and the court said:

“That provision is directory to them, and intended to be beneficial to the constable by affording evidence, that his sureties had been adjudged to be sufficient, and also to those, who might become interested in the bond by showing, that such adjudication had been formal and deliberate.”

In *Hayes v. Hanson*, 12 N. H. 209, it is said:

“Even where the law requires that pro-

ceedings shall be filed and recorded, it deserves consideration whether such requisitions ought to be deemed conditions precedent, without which the act is void, or only directory to the officers in the performance of their duty, the omission of which might subject them to responsibility. There are many cases where an act is prescribed by law to be done, and record made thereof, and nevertheless, if left unrecorded, the act is valid. What requisitions are to be deemed conditions precedent, must depend on a sound construction of the nature and objects of each regulation and of public convenience, and apparent legislative intention."

It is well right here to state that the Supreme Court of New Mexico, in this case, has construed the Statute of New Mexico (Sec. 3832) which has been cited in appellant's brief, page 42, by holding that the evidence of McFarland could be given to prove the act which they found to have been established.

In *Beach v. Stouffer*, 84 Mo. App. 398, the court, after citing *Mill Co. v. Bennett*, 39 Mo. App. said:

"That the acts of corporations, like those of individuals, may be shown by parol in those cases where there is no record made, or one made which bears its incompleteness on its face, or where there is fraud, *oversight, omission or mistake*." And on page 399, said: "The contract here seems not to have been entered on the corporate records, or, if so, the same were lost or destroyed, and

could not be produced. No reason is seen why the evidence was not admissible as primary evidence if entered on the corporate books; or, as secondary evidence if entered on the corporate books and such books were destroyed. The evidence was ample to establish the set-off pleaded in the garnishee's reply."

Citing:

U. S. v. Fillebrown,

U. S. Bank v. Dandridge, 12 *Wheat.* 69;

and quoting from them with approval, the court then said:

"It is not true, even with respect to corporations, that all their acts must be established by positive written evidence."

In *Ratcliff v. Teters*, 27 *Ohio St.* 80, the court said:

"The question has long been settled in Ohio. In the case of *King v. Kenny*, 4 *Ohio*, 79, a very important litigation depended on the fact whether a certain public highway had been legally established. The statute provided that the line of the proposed road shall be viewed and surveyed, 'and that the survey and report of the viewers' be recorded, and from thenceforth such road should be a public highway. The clerk of the commissioners made no such record. But the court properly said, on pages 82, 83; 'The omission was in the clerk of the commissioners. It would seem unreasonable that such

ministerial nonfeasance should render the whole proceedings nugatory. To authorize this construction, for such omission, would require precedent and authority; but, in fact, they are the other way. When all the requisites have been performed, which authorize a recording officer to record any instrument whatever, it is in law considered as recorded, although the manual labor of writing it in a book kept for that purpose has not been performed.' " Citing: *Marbury v. Madison*, 1 Cranch 161, 10 East 350. "We might cite numerous authorities, were it needed to sustain this doctrine so well stated by our own court. But this rule of law is now as well settled as any other. The only question to be made in applying the rule is, was the act of recording, which was omitted, a mere ministerial act? If so, then whenever done, it is only the recorded evidence of the official act, and relates back to the time when it should have been done."

Appellant has cited quite a number of cases for the purpose of showing that parol evidence was improper in regard to proving the adoption of the definite location, but the cases cited, nearly all, if not all, are distinguishable or can be explained by the fact that they are either cases where forfeiture is attempted to be enforced, where the statute must be construed strictly, or where parol evidence has been attempted to be introduced in the absence of a record which actually exists, or where there is no evidence that there was or was not any record on the subject.

The case of *Mandel v. Swan Land Co.*, 154 Ill. 177, so cited, is one which on its face admits that the evidence given in this case was proper. It says:

“In addition to the evidence authorized by the statutes, the original books would be admissible, and in case of loss or destruction the contents might be proven, and under certain circumstances, where there is an omission to make any record on the subject, parol evidence may be heard.”

Citing:

Ratcliff v. Teters, 27 Ohio St. 66; and
Bank of United States v. Dandridge,
12 Wheat. 64;

and then states:

“Evidence of a secondary nature is not to be resorted to where there is in the possession of a party evidence of a higher and more satisfactory character.”

In the case of *Corcoran v. Sonora Min. Co.*, 8 Ida. 651, cited by appellant, it appears that that was a case where an assessment had been made on stock and for non-payment of the assessment, the stock was declared forfeited and sold, and the opinion is based entirely upon the fact that there was a forfeiture of stock and says (p. 661):

"In this case it is shown that the corporation sought to levy an assessment on the stock of appellant, and thereafter declared a forfeiture and sale of eight thousand shares of this stock in the corporation. All the authorities to which our attention has been called hold, not only a substantial, but a strict, compliance with the statute must be had, or the sale is void." And quoting from a Washington case it says: "This section, it will be perceived, provides for forfeiture and sale of the stock for delinquent assessments, but in such cases the authorities all seem to hold that the power to sell must be exercised strictly in accordance with the mode prescribed by the statute." And then, quoting from Morawetz, it says: "In many instances, however, it has been provided in charters and general incorporation laws that the shares of a stockholder may be declared forfeited and sold for non-payment of assessments. A power of this character must be construed strictly, and the validity of a forfeiture and sale of the shares of a member depends upon a *strict* compliance with the *formalities prescribed*."

In the case of Methodist Chapel Co. v. Herrick, 25 Me 354, quoted by appellant, evidently there was no effort in that case to show whether or not any record of the acts of the corporation had been made and no production of any record was had or accounted for, although it says: The record is presumed to have been made, which, of course, can be shown not to be the fact, and the only thing

that decides is whether the record has been made or whether there is any accounting for it not having been made.

In *Unioin Mining Co. v. Bank*, 2 Colo. 565, cited by appellant, the case states that a record is shown to exist and that certain proofs must be made on the introduction of that record, but no such proofs were made, and they held that there was insufficient proof of the record or the want of a record, and it also appears that in that case questions of fact arose and that the record was not sufficiently authenticated without certain other evidence and that parol evidence could not be given when there were records to establish it. It says:

"Obviously, a corporation relying on its own acts should be held to such proof," and that that offered was insufficient; i. e., to establish the correctness of the record in that case.

In *Dennis v. Joslin Co.*, 19 R. I. 666, cited by appellant, the case, on its face, simply says that the record is the best evidence, but that it is not conclusive, and it does not say that other evidence might not be introduced if there were no record. In that case apparently there was a record, but it was not introduced or its absence accounted for.

In *Ramsdell v. Rivet Co.*, 104 Fed. 16, cited by appellant, it appears that there were no records or minutes of any character produced before the master, nor is there any want of a record accounted for.

In *Beeler v. Highland Co.*, 54 Pac. 295, cited by appellant, the holdings show that an act of the corporation which must necessarily be proven by a particular individual and the record thereof duly kept, cannot be proven when such record, if it exists, is accessible to the parties, thus amplifying, of course, the proposition that if there was such record at all, it should be proven by the record. In fact, the case says:

"If there was no record of such action retained, then secondary evidence might be resorted to; but it was incompetent to show by oral testimony what the presbytery had done *without first showing that its action had not been recorded, or that the record was inaccessible.*"

This case is clearly in point for appellee.

In *Stock Assn. v. West*, 76 Tex. 461, cited by appellant, it is said:

"It is a familiar rule governing the production of evidence that the best evidence of which the case in its nature is susceptible must be produced, and none other can be received, if objected to, until the non-production of the best is accounted for. There was no attempt to show that the records of the corporation had been destroyed, or to explain any other way the non-production of the primary evidence as a predicate for the introduction of the secondary evidence offered."

In *Nixon v. Goodwin*, 85 Pac. 169, cited by appellant, the court said:

“The minutes of the board of directors at that meeting were not produced, and not even an extract of the minutes of that meeting was offered. * * * Whatever may have been the reason for omitting the introduction of the minutes of that meeting, its proper recitals could not be proved by an oral statement.”

Evidently, in that case, there was an effort to prove the contents of the minutes without producing or accounting for the absence of any record of them.

The case of *Haven v. Asylum*, 13 N. H. 532, cited by appellant, it appears that there were records of the corporation and no notice was given to produce them. An attempt was made to prove the contents of the record without producing it or accounting for it. The court said:

“If the plaintiff desired to prove any fact which appeared of record, he should have notified the corporation to produce the books and if they had not been produced, he might have given parol evidence.”

There was no contention there that there had not been any record.

In *Pittsburg R. R. Co. v. Clark*, 29 Pa. St. 146, cited by appellant, the opinion shows that that

was a special case where one corporator was substituted for another, and they required that the same kind of facts should exist and be proven as was necessary to establish the original incorporator, and the court said:

“There is no evidence tending to show that the question was ever presented to the consideration of the board or that any action was taken by the board in regard to the transfer.”

There is no showing whatever that there was not such a record or that there was and in the absence of such showing, of course, parol evidence would not be admissible.

In *Hurd v. Hotchkiss*, 72 Conn. 472, cited by appellant, an attempt was made to prove certain facts by parol. The court said:

“The question in form required the witness to declare whether or not the directors of the St. Regis River Lumber Company had done a certain act. The act of the directors of a corporation can be shown only by their recorded vote.”

And it does not appear that there had not been any recorded vote, or that the recorded vote had been lost. So far as it appears, there might have been a recorded vote. In that case, of course, it would have been the best evidence.

In *Stevens v. Eden Society*, 12 Vt. 686, cited by appellant, the court said:

“Here the clerk was authorized to warn a meeting by posting up a written notice. No other mode of calling a meeting could be shown, and, most clearly, this could not be proved by parol, until the loss of the notification was first proved; but this was not attempted.”

It appears from the foregoing that all of the cases which appellant has cited as to the proposition that parol evidence could not be introduced to establish an act which actually took place are based upon peculiar facts and circumstances which render them inapplicable to this case.

It is submitted that the action of the Supreme Court of New Mexico in sustaining the proof given by McFarland in this case and which was held by the Supreme Court and the District Court of New Mexico to be competent; and by which the statute of New Mexico was construed by the Supreme Court of New Mexico in so holding it to be competent, as proof, is binding upon this court, even if there was a doubt what the law in other jurisdictions might be.

The power or authority of a railroad corporation in New Mexico to adopt a location of its right-of-way or road is in sub-section 3 of Section 3847 C. L. L. 1897, which is as follows:

“To purchase, and by voluntary grants and donations, to receive and take, and by its officers, engineers, surveyors and agents, to enter upon, possess, hold and use in any manner it may deem

proper, all such lands and other property as its directors may deem necessary, proper and convenient, for the construction, maintenance and operation of its railroad and telegraph lines, or either thereof, and for the erection of stations, depots, water tanks, side tracks, turn-outs, turn-tables, yards, workshops, ware-houses and for all other purposes necessary or convenient to said corporation in the transaction of its business."

It will be noticed that nowhere does this section require that the action of the directors shall be in writing or made of record. It can be admitted for the sake of argument that a preliminary survey run by engineers, not being approved by the directors, would not constitute a final or definite location by the road and would not bind the company. But a corporation must assent to and adopt the acts of the engineers, but the statute nowhere attempts to say that this assent or adoption must be proven in a particular manner or by any record. The evidence by which the corporate action is to be established is not prescribed or limited by any statute. Section 3832 of the C. L. L., 1897--New Mexico--quoted in appellant's brief, p. 42-43, makes the stock transfer book *prima facie* evidence, but it does not say that any other record which the section directs to be kept shall or may be so received as evidence. Under the rule that the mention of one excludes the other, you can not adopt the contention of appellants that the stat-

ute makes the record evidence, much less the only evidence, except the transfer books which are made "Prima Facie" evidence. We concede that you cannot prove the *contents of a record* by parol, but the authorities are overwhelming on the proposition that corporate action not in any record, may be established by the testimony of any one who was present and knows that such action was taken. And, furthermore, if such proof is not available, presumptive proof may be relied upon, and there is no distinction between the case where such proofs are relied upon in favor of the corporation and the case where they are offered against it.

The case of *Bank of the United States v. Dandridge*, 12 Wheat. 64, is one where the bank was seeking relief and undertaking to prove the record. Many of the other cases which we have cited contain statements to the effect that the rule applies in either way.

POINT II.

"APPELLEE APPROPRIATED THE LINE WHEN THE FINAL LOCATION WAS MADE AND THE SAME WAS RATIFIED BY THE DIRECTORS."

The filing of the map was no part of that final location. After a location has been made, even though it is final and even though a map had been

filed with the Secretary of the Territory and with the Probate Clerk, the same is authorized by Subdivision seventeen of Section 3847 (C. L. L. 1897) *ut supra* to be changed. That section permits the line of the road to even be changed at any period of time, even after the road had been absolutely constructed over it, and, with much greater propriety, before the construction of the road.

It appears in this case by the findings that the line as originally adopted to Farmington from the Colorado border, was changed, commencing at a point about a mile and one-half northeast of Aztec and extending southward six and one-half or seven miles, where it again united with the originally adopted line with which it continued for about five miles southward and then again was changed for a distance of about three miles to the town of Farmington. This new change or location was adopted by the directors of appellee as shown by the findings and established either by the record or by the testimony of the witness McFarland, in the absence of any record thereof, which absence is shown by the additional findings, No. 10, p. 143, which says:

“The court finds that every order made by plaintiff’s board of directors as to adoption of surveyed lands has been put in evidence, *and yet the record does not show any order by that board of the adoption of the line appearing on plaintiff’s exhibit 35 and 36*, but there are two orders of adoption under dates of October

24, 1904, and December 3, 1905, respectively."

And in additional findings, No. 11, page 143, the court finds that the line from the point of divergence northeast of Aztec to the place where the lines unite, and from the point of the second divergence to Farmington—is not covered by *any order of adoption made of record by the plaintiffs*.

So there is a complete finding that there is no record made by appellee of any such adoption. Therefore parol proof was proper and competent to be introduced.

Appellant quotes Section 3875 C. L. L. 1897, New Mexico, on page 61 of its brief to the effect that: every corporation formed under this act, *within a reasonable time after its road* shall have been *finally located*, must cause a map and profile thereof and of the lands required and taken for the use thereof and the boundaries of the several counties through which the same shall be run, to be made and file the same in the office of the secretary of this territory, and, also, similar maps of the parts thereof located in different counties, and file the same in the office of the clerk of the different county in which such parts of the road shall be situate, there to remain of record forever. And then insists that the filing of such map should be made immediately after the map itself had been completed, and that that constituted an indispensable part of the "final location" of the road, and

cites some authorities to support its contention, one being *Sioux City Land Co. v. Griffey*, 143 U. S. 32, and *Tarpey v. Madsen*, 178 U. S. 215, and some other authorities. The statutes under which these cases were decided are not at all like the statute of New Mexico. It will be noticed that the statute of New Mexico expressly provides that the final location may be made, but that thereafter, i. e., after the final location is made, and within a reasonable time, a map and profile thereof and of the lands required and taken for the use thereof, etc., must be made and the same filed in the office of the secretary and of the county clerk. This statute, in its very terms, shows that the map and profile is no part of the final location, as it states that the map and profile shall be made "after" the road has been *finally located*. They would become evidence of the final location, without doubt, the same as the record of a deed of conveyance would be of a purchase or sale of land. That section provides that copies of the said maps and profile, certified by the secretary, shall be *prima facie* evidence of what they contain, in all courts, etc. The cases cited from the two reports last mentioned are not based on statutes at all like that.

The appellant also cites *White River R. R. v. Telegraph Co.*, 98 S. W. 721, which is decided on a statute not at all in point. That statute provides, as recited in the opinion, that a railroad company "before" constructing part of its road, shall make and file in the office of the clerk of the county

court a map and profile, and that it is without authority to clear the way "before" such filing, and so it is liable for damages in the destruction of the line of a telephone company in so clearing the way, though it surveyed its line of road before the telephone line was constructed.

There is a provision that is imperative in its character and mandatory. It provides that "before" constructing any part of its road, it shall make the map and profile and file it. That was a case where, without having made the map and profile and filing them, an attempt was made to clear the way for the road, i. e., in its construction, and that is all that it decides; it is not at all like the statute of New Mexico.

The statute relied upon by appellant in *Biles v. Tacoma R. R.*, 32 Pac. 213-214, is a statute which is of a negative or prohibitive character and provides that:

"Before building any such branch road, such corporation shall, by resolution of its directors or trustees, to be entered in the records of the proceedings, designate the route of such proposed branch, and file a copy of such record, certified by the president and secretary of state, who shall indorse thereon the date of the filing thereof, and record the same, and thereupon such corporation shall have all the rights and privileges," &c.

This expressly prohibits a thing to be done before

the road can acquire its right-of-way. It is one of those that come under the exception, i. e., the thing sought to be done cannot be done until something else is done. The statute expressly says that, by stating, that "before" building any such branch, the resolution, etc., shall be inserted in the record in writing, and is a prohibition against building until that has been done, which takes it out of the general line of decisions; that if the resolution had not been made of record, it might have been proven *aliunde*.

The case of *So. Ind. R. R. v. Indianapolis R. R.*, 168 Ind. 360, quoted in appellant's brief on page 63, does not argue at all against the proposition of appellee, as it only says:

"There must be some step taken which amounts to a legal location of its line, for railway purposes, before a company can insist that for many miles ahead of its actual use and occupancy its real estate is not subject, under the general statute, to appropriation by *another company*."

But says nothing about filing any maps or plats as a condition precedent.

We insist that the proper steps were taken that amounted to a legal location of this line and that the findings show it. In that case the statute of Indiana is recited and it says (p. 372):

"Every such company, *before* proceeding to construct a part of its road into or

through any county named in its articles of association, shall make a map and profile of the route intended to be adopted by such company, which shall be certified by a majority of the directors, and filed in the office of the clerk of such county, for the inspection and examination of all parties interested therein."

It will be noticed that this statute states that this shall be done "before" the company proceeds to construct its road. The court then quotes from a case in the supreme court of Kansas, in which the opinion was rendered by Justice Brewer, as follows:

"The only question is, do these requirements antedate the condemnation proceedings? It is a question of construction and intention, and not one of power. When must the map and profile be filed? Section forty-eight answers the question: 'Before constructing any part of the road.' If filed before construction commences, the clear letter of the law is obeyed. The legislature has fixed the time, who can change it? It is a matter entirely within legislative control, and beyond judicial determination. When is the construction of a road commenced? The term has no technical meaning. What is its ordinary acceptation? It refers to the labor put forth to fit and adapt a certain selected route to the running of cars. Construction is building. Building a road—constructing a road. This certainly does not include buying the ground on which to build and to construct it. Buying

a piece of ground is not a part of constructing a house. It may be an essential prerequisite, but it is not a part of it. Much work has to be done before the construction of the road commences. * * * It may be said that, except as preliminary to the application for condemnation of the right-of-way, the filing of a map and profile would be of little value. Possibly this may be so. It was deemed entirely unnecessary for four years. If so, it would not justify us in giving to the section a meaning its language did not authorize."

The remainder of that decision is referred to the consideration of the court as bearing upon the question at issue.

Section 3874 (C. L. L. of New Mexico) is quoted in full on page 61 of appellant's brief, and in part on page 65 of that brief. This section is almost identical with the statute of West Virginia. Section 65, C. 54, Code 1887 of West Virginia says:

"Every such corporation shall, *within a reasonable time after* its railroad is located, cause to be made a map and profile thereof with the names of the owners of the lands through which it runs and the noted places along the same stated therein, and file the same in the office of the secretary of state, and in the office of the clerk of the county court of each county in which any part of said road is located."

In *Wheeling B. & T. Ry. Co., v. Damden Cons. Oil Co.*, 35 West Virginia, 209, that statute is

quoted in full, and the court on page 209, after reciting the statute, said:

“Is the filing of such map and profile of location a condition precedent to the right to condemn land? It is not in express terms made a condition precedent to the exercise of such right, and, if it be such, it must arise from an implication reasonably necessary. By chapter 54, Sec. 34, of the Code of 1887 when the certificate of incorporation shall have been issued and delivered as provided, ‘the incorporators named in the articles of incorporation recited therein, and who have signed the same, and their successors and assigns shall from the date of said certificate become and be a body corporate, as therein stated, and as such authorized to proceed to carry into effect the object set forth in said articles of incorporation in accordance with the provisions of this chapter.’ Chapter 42 of the Code confers upon railroad companies, among others, the right to take private property for the construction of their roads, and prescribes the prerequisites and the method of procedure, and among them is the requirement that the application be in writing, ‘describing with reasonable certainty the real estate proposed to be taken;’ so that to give a particular and certain description to the owner of the land proposed to be taken cannot be the sole purpose of requiring the map and profile to be filed, but rather its location as a whole may be accessible to the public, and a description of the extent and limits of the *real*

estate owned by the railway company may be preserved. And the court below has the right to require that the description of the land proposed to be taken be made certain and definite, and, if deemed necessary to that end, to require a map and profile of the location, as far as it has been made, to be filed or produced; for the law contemplates that construction of the road may be commenced, and therefore, if necessary, condemnation of the land may be had, before a final location of the whole road, as intended and set out, has been made; for section 69 of chapter 54 provides that 'any railroad company organized under this chapter may build and construct lateral and branch roads or tramways, and of any gauge whatever, not exceeding fifty miles in length; and it may build planes and gravity roads, use and operate any part or portion of their main line and branch or branches, when completed, the same as though the whole of their said proposed railway was fully completed.' So again, our statute contemplates, in fact requires, in this particular, as a necessary prerequisite to the right of condemnation, that the railroad corporation shall acquire such real estate by purchase, if it can agree with the owners."

The statute of West Virginia, therefore, as referred to in that decision, seems to be entirely in line in all its parts with the statute of New Mexico, and it is more than probable that the statute of New Mexico was taken from the statute of West Virginia, making some slight changes to adapt

it to the changes in New Mexico, that being then a territory and under somewhat different system of laws; but that decision is directly in point as to the requirements of the map, i. e., that they were not a condition precedent. In that case they had not been filed when the parties sought to condemn the land.

The appellants in this case, on page 60 of their brief, say the map must have been made before the company could condemn, consequently the two sections should be construed together and held to require the filing of the map as a prerequisite to a completed appropriation. Just exactly contrary to the statement made in the West Virginia decision, it would appear. It is insisted that that decision is at least persuasive in this case and is directly in point.

POINT III.

“APPELLEE WAS NOT GUILTY OF ANY LACHES” AND DID NOT LOSE ANY RIGHT IT HAD BY REASON OF LACHES OR INABILITY TO CONSTRUCT ITS LINE.

First, there is no finding of fact, either among the original findings or the additional findings that appellee was guilty of any laches or was not able, financially, to construct this line. The only finding is that it was impracticable to construct it between the state line and Farmington on account of the acts of the appellant in taking pos-

session of the line and crossing it eight times in twenty-seven miles at acute angles and at different grades from that established by appellee, and holding possession of it under the bond which was given, rendering it impossible for the appellee to get possession. Appellants have insisted in their brief that nine years have elapsed since the commencement of this action, and that appellee has not built any part of its line. That is somewhat of an exaggeration—not quite all that time has passed, but ever since May the 12th, 1905, this case has been pending in the courts and appellant has been holding possession of this crossing of appellee's land and rendering it impracticable for appellee to construct its line. It is insisted that this court has no information or knowledge as to what appellee has done in reference to constructing its line since the rendering of the decree in the District Court on December the 20th, 1907 (Tr. 111-12). Nor since the report of the referee which was found on December 4th, 1906 (Tr. pp. 78-9 and 10).

In *Pittsburg Ry. Co., v. Fiske*, 123 Fed. 760, it is said:

“That status which it was the duty of the court to maintain, was that, which rightfully and actually existed when the injunction was applied for, and not that which the defendant had wrongfully endeavored to create;”

Which is exactly applicable to this case. The appellant has been constantly insisting that since it took possession, without authority, as found by the court, of the different points on the right-of-way of appellee and occupied and crossed it a number of times at different grades from that established by appellee, it ought, notwithstanding that fact, to have gone on and constructed its road. It could only have constructed it by laying out a different line and avoiding the various crossings or conflicts. The crossings were at acute angles, as the findings show, occupying a large space in the right-of-way and rendering it impossible for lengthy trains to cross without the liability of coming into contact with each other. In addition to that appellant built its crossings at a different grade so that appellee would have to change its road for crossings, raising or lowering them so as to meet such condition. After the decision of the New Mexico Supreme Court reversing the judgment of the district court and setting aside the dismissal, a bond was given so as to dissolve the injunction in this case. Appellee calls attention to the proceeding of the court in the case; i. e., the complaint in this case (Tr. pp. 2 to 16) was filed May the 12th, 1905, and a temporary injunction was granted as prayed for (Tr. p. 20) and issued on the same day. Appellant demurred to the complaint June the 2d, 1905 (Tr. p. 22) which demurrer was sustained and the complaint dismissed, from which judgment ap-

pellee appealed to the Supreme Court of New Mexico (Tr. p. 23) on June the 3rd, 1905. The Supreme Court of New Mexico reversed the judgment, dismissing the complaint and directed a reinstatement of the same on the docket (see Mandate, Tr. p. 24 and p. 25) which was issued March the 5th, 1906. On reinstatement the judgment of the Supreme Court provided that appellant might retain possession of the ground occupied and proceed to construct its road, if it so desired, upon giving a bond to appellees for the payment of all damages and the compliance with any decree that might thereafter be rendered which bond was given, but the record fails directly to show a copy of the bond or the order, but the 20th original finding (Tr. p. 89), establishes that fact. It says:

“That after the dissolution of the preliminary injunction in the case, and after the execution of the bond required by the Supreme Court of the Territory of New Mexico, to be given by the defendant company, as a condition for withholding the restraining order restraining defendant from proceeding to construction upon the points and places in conflict between the said plaintiff and defendant, the defendant company proceeded with the construction of its said railroad down the said Animas Valley to the said town of Farmington, and laid ties and rails upon the grade constructed by it, and in about the month of September, 1905, had said road in operation and was running trains thereon, and has since continued to oper-

ate the said road along the line so constructed by it to said town of Farmington and is now engaged in the operation thereof."

This shows that the injunction was dissolved, and by the requirements of the court, a bond was given to plaintiff to take the place of the injunction, i. e., to secure to the plaintiff any damages that might accrue to it, and a provision for compliance with the order of the court.

Appellant filed an answer April 19th, 1906 (Tr. p. 56). Appellees filed their reply to the answer May the 5th, 1906 (Tr. p. 67). Objection was made to Judge McFie trying the case and he changed the venue therein from the San Juan County First Judicial District Court to Bernallillo County, in the Second Judicial District Court, presided over by Judge Abbott on May the 23d, 1906 (Tr. p. 75). Appellees on June the 4th, 1906, applied to the court for the appointment of a referee to take proofs and report (Tr. p. 77). The court appointed E. C. Burke, a referee, to take the proofs on June the 28th, 1906 (Tr. p. 78). The testimony in the case, which as appears from the record filed covering three large volumes, was taken with all convenient speed between June the 28th, and December the 4th, 1906, and the referee on December the 8th, 1906, filed his said report with the clerk (Tr. pp. 78-9-80-81). The cause was then argued, submitted to the court and taken under advisement until December the 20th,

1907, when the decree was rendered and entered therein (Tr. pp. 111-12 and 13). From this decree the appellants appealed to the Supreme Court of New Mexico (Tr. p. 114) February the 1st, 1908. On February the 15th, 1908, appellant gave a supersedeas bond (Tr. pp. 104-5 and 6). The transcript of appeal was filed in the New Mexico Supreme Court about January the 8th, 1908 (Tr. 118). On July the 10th, 1908, the assignment of errors was filed (Tr. pp. 119 to 133). The cause was thereafter continued from time to time by the Supreme Court of New Mexico until the **January term, 1911, when** it was argued, submitted and taken under advisement by the court (Tr. p. 136). On August the 26th, 1911, the decree in said cause was rendered and entered (Tr. pp. 137-8). On September the 30th, 1911, a motion for rehearing was filed (Tr. p. 139). On December the 5th, 1911, the motion for rehearing was denied (Tr. p. 140). And on the same day the court adopted the finding of facts which had been found by the court below, as the finding of fact by the Supreme Court, in the nature of a special verdict (Tr. p. 140). Afterwards, on the 22d day of December, 1911, the court, on the motion of appellants, made *additional* findings of fact (Tr. pp. 140 to 146). And on the same day, on the motion of the appellants, an appeal was granted to the Supreme Court of the United States (Tr. p. 147). And on May the 20th, 1912, (Tr. pp. 158 to 178) appellant filed in this Court

its assignment of errors.

It will be seen by the foregoing that appellee has, since the commencement of this cause, by reason of the dissolution of the said injunction and superceding it with a bond and by reason of the appeal from the district court to the Supreme Court of New Mexico and the superceding of the decree of that court by the appeal bond and the continuance of the cause from time to time, has been unable to use its final locations at the various points of conflict and interferences, made by appellants on appellee's line; without being in contempt of court; nor has it been able to take possession of or use the same for the purpose of constructing its line, as it had been finally located and adopted and proposed to be constructed. Certainly appellants cannot complain of this condition brought about at its own instance, and which absolutely made it impossible for appellees to proceed to construct their line between the Colorado state line and Farmington, without surveying and adopting a different one and abandoning the one which it had finally located and adopted, and which the court has found was the "best location which could be had." No court in the world would compel appellee to take such action while the proceedings in this case were pending and being prosecuted, as the record shows they were. There was nothing left for appellee to do except to wait or give up its line, which was the best location, and take a new one, which would

not be as good as the one which it had formerly located. There are no proofs showing that a better line could be obtained, only the fact that a straighter line could have been obtained, but the finding of facts do not show that that would be as good or better than the one they located on, but they show the contrary, that the one located on was the best line.

Appellee, since locating its line and the commencement of this action, has been unable in spite of its efforts, to get an opportunity to build on the part of the line in controversy. Until it is determined whether the appellant can take from appellee, at will, any part of its line, appellee can not proceed with safety to the construction of its line, especially since appellant has actually taken possession and is holding it at the points of crossing. The Supreme Court of New Mexico has absolutely determined this proposition by the 28th finding (Tr. p. 91) which says:

"That the conduct of the defendant, in seizing upon and taking possession of the points in conflict herein *immediately upon the dissolution* of the injunction in this case, has rendered it impracticable for the plaintiff to proceed with the construction of its road in San Juan County, in the Territory of New Mexico, *pending this litigation*, and that because of the length of the line of road contemplated by the plaintiff and its allied corporations, and the distance from any base of supplies, it is apparent that a

considerable time must elapse before the actual possession of the points in controversy now occupied by defendant's road will be required by the plaintiff, in the construction, maintenance and operation of its said line of road; and that during such period and until the possession of the same shall be required by the plaintiff company for the construction of its own line, it is unnecessary to compel the defendant to remove its line, or interfere with the operation of its road over such points, subject to the prior right of plaintiff to construct its own road thereon; but that the said plaintiff by virtue of its prior survey, location and adoption of its said line and its compliance with the laws of the Territory of New Mexico, *has acquired and is entitled to the better and prior right* to construct, maintain and operate its own road upon the said line so located and adopted by it throughout its entire length, including the portions thereof now occupied by defendant, and is entitled to the possession thereof for said purposes whenever, prior to a forfeiture of such rights, it shall proceed to complete construction of its said road over the same."

POINT IV.

"THE CAUSE IN CONTROVERSY PRESENTS A CASE OF SUCH INJURY, REPARABLE OR OTHERWISE, AS IS COGNIZABLE IN A COURT OF EQUITY, AND APPELLEE HAD NO ADEQUATE REMEDY AT LAW."

Appellee had the right to the possession of its located and adopted line, and as much actual possession thereof as it was possible after location, survey and adoption thereof, when this action commenced. Possession is:

"Simply the owning or having a thing in one's power; present right and power to control a thing."

31 *Cyc. of Pro.*, 924.

Constructive possession is that "possession which exists in contemplation of law, without actual personal occupation; that which the law annexes to the title, and which may exist without an actual *pedis possessio*, where there is a present right, and the possession is either vacant or consistent with the right of the owner to an immediate and actual possession by himself."

31 *Cyc. of Pro.*, 927;

Wamman v. Hampton, 110 N. Y. 433;

Heinze v. Butte, 126 Fed. 1, 3;

Sullivan v. Sullivan, 66 N. Y. 42;

Fleming v. Maddox, 30 Iowa, 241.

Appellant was a mere trespasser; its possession in no event could be called adverse, if any it had when this suit was commenced, which is denied. Appellee was in possession when it occupied the line with its final location stakes which stayed there and had the same effect as an inclosure.

The law provides how land shall be possessed for a right-of-way in the first instance; it must be by survey, location, putting down stakes and complying with the law, until the location is made definite and final. Stakes marking the road-bed as definitely surveyed and adopted, act as an inclosure; they warn off like a fence all intruders; tell them the location is owned by others, puts them on inquiry for further information. Appellee surveyed, located, staked and adopted definite lines. They gave the right of possession and in the absence of actual, adverse possession, such acts draw to appellee the possession.

The findings show that appellant was not in occupancy of any of the crossings when suit was commenced. In the absence of any finding of adverse occupancy by appellant at a crossing at the time suit was commenced, appellee had the possession because it had the right to it. It is laid down as a rule in the absence of a statute to the contrary, that:

“It is the survey and location of the road that constitutes the taking of the land for right-of-way.”

1 *Rorer*, 315;

Troy v. Boston R. R. Co. v. Potter, 42
Vt. 272.

The law of New Mexico authorizes a survey and location of the line; provides for the approval of the survey; authorizes the filing of a map or

plat thereof "at some subsequent time," without specifying when, except that it must be "reasonable."

The findings show appellee surveyed its line of road in San Juan County, between Farmington and the Colorado boundary; to do so made various preliminary surveys in order to get the best line; that they finally made a definite location of the line and drove down definite location stakes which were specially marked and could be known by anyone going over the ground who had any knowledge of railroad location, as being a definite location.

The authorities go to the extent of saying that, if a party going on the ground should find any stakes there which would be recognized as survey stakes, that was sufficient to put the party on inquiry and thereby be equivalent to actual notice as to what had been done.

Appellant made surveys upon the ground in question, had its attention called to and saw those stakes and had notice through them of appellee's location, or was at least put on inquiry. Also, between Farmington and a mile and a half north of Aztec, appellee had entered into options with the various owners of land along that road for a right-of-way, and these parties, the findings show, informed appellant, when it went on the land to survey, that they had given such options and called attention to the stakes. The survey, definite location and approval of survey by the di-

rectors of appellee, were all done before appellant ever entered upon the ground at all, or even started its road from Durango, Colorado; and appellee, in a reasonable time, filed the plat and profile of their location in the proper offices.

The findings show that appellant had no possession of the ground in conflict at the several crossings at the time of the commencement of this action, and that so far as they had been on the ground occupied by the crossings, they were there as mere trespassers. Their survey and location were subsequent to appellee's location and subordinate to it.

A trespasser can acquire no rights against the legal owner, especially in less time than it takes the Statute of Limitations to run, which is ten years in New Mexico. In fact a trespasser does not even interrupt the running of the Statute of Limitations against the prior possessor holding in accordance with law.

The owner or person entitled to the possession of land can bring suit against a mere trespasser thereof, so as to enjoin his acts. This is particularly so when there is a probability of irreparable injury, or inadequacy of pecuniary compensation, or to avoid a multiplicity of suits.

In a case where there is a practical destruction of the rights of one person by another and a threatened continuance of the acts by the other party which renders the injury caused irreparable, if defendant is allowed to continue its acts,

injunction will lie.

1 *High on Inj.*, Sec. 697;

Thorne v. Sweeney, 12 *Nev.* 251;

Western Union Tel. Co. v. Judkins, 75 *Ala.*
428;

McGregor v. Silver King Min. Co., 14 *Utah*
47;

Byers v. Hawkins, 67 *Ark.* 413;

Collins v. Sutton, 94 *Va.* 127;

Moore v. Halliba, 72 *Pac.* 800.

Which last case says:

“Where owing to the *peculiar character* of the property in question the trespass complained of cannot be adequately compensated in damages, and the remedy at law is plainly inadequate, equity may properly interfere by injunction.” Citing:

Clark v. Jeffersonville R. Co., 44 *Ind.*
248;

Poughkeepsie Gas. Co. v. Citizens Gas Co., 89 *N. Y.* 493.

Which last case says:

“The general rule is, that where the injury is permanent in character and the damages resulting therefrom continuous in their nature, and especially where from the nature of the act and the injury suffered, it is impossible or difficult, to ascertain and determine the extent of the

injury which may flow from a continuance of the wrong, an injunction is the proper remedy."

In this case there is an absolute destruction of the estate by taking it and appropriating it by appellants to their use, and excluding appellee therefrom, without authority to continue such appropriation and exclusion, which makes a matter of injury that cannot be compensated to an owner of property, or one having the absolute right thereto, or the absolute right to preserve it in its present condition, or for the purpose of converting it to the uses which he seeks to make of it.

In 22 Cyc. 428-b, it is said:

"When the complainant is in possession and seeks to restrain a trespass by one who claims under a color of right, the injunction will usually be granted where the threatened acts may tend to the destruction of the inheritance, or would result in a multiplicity of suits."

Certainly the acts of the appellant in this case would be destructive of the inheritance.

Where the threatened injury would be irreparable, an injunction would lie at the instance of complainant out of possession.

22 Cyc. 827-8;

Kyser v. Dalto, 140 Cal. 167;

Hicks v. Michel, 15 Cal. 107;

Gaines v. Leslie, 1 *Ind. Terr.* 546; 3
Hillman v. Hurley, 82 *Ky.* 626;
Chesapeake Co. v. Young, 3 *Md.* 480;
Henan v. Wade, 74 *Mo. App.* 339;
N. J. Zinc Co. v. Trotter, 28 *N. J. Eq.* 3;
Shubrick v. Guerard, 2 *Desaus Eq.* 616;
Leroy v. Wright, 4 *Sawyer* 530;
 22 *Cyc.* 825,

which says:

“A threatened injury of a permanent or irreparable character of a railroad to the *vested rights* of an individual or another corporation may be enjoined, especially when sought to be done under the color of a charter.”

Florida R. Co. v. Pensicola R. Co., 10 *Fla.*, and cases cited in note 45.

“A railroad company has such a title in its right-of-way as to permit it to obtain an injunction against the construction of a street railroad crossing over its tract at a point other than a highway crossing.”

Northern C. R. Co. v. Harrisburg Elec. R. Co., 177 *Pa. St.* 142.

The trespass committed by appellant cannot deprive appellee of its rights, or equity of jurisdiction.

Simmons Creek Coal Co. v. Doran, 142 U. S. 417, (page 449).

In which case it is said:

“As heretofore stated, such possession as the land was susceptible of had been taken by Witten and maintained by himself and his grantees down to the time, after October, 1884, when appellant entered upon a part of complainant's land in the commission of a trespass, and commenced committing acts of waste upon the property. It cannot be held that this trespass upon appellant's part constituted a possession which in itself would *drive* complainant to an action of ejectment.”

Finding 23 (Tr. p. 90) says:

“That it does not appear when, if at all, the defendant company adopted the line upon which its said road was constructed as aforesaid, and no plat or profile of said line was filed by said defendant company at any time prior to the actual construction thereof, or at any time before December 12th, 1905; and that it does not appear that any declaration of intention to build the said line of railroad was at any time ever filed by the defendant company in the office of the Secretary of the Territory of New Mexico or of the Probate Clerk and Recorder of said San Juan County, New Mexico.”

Also, finding 24 says:

"That defendant is a foreign corporation, organized under the laws of the State of Colorado, and that it appears that the only copy or purported copy of its articles of incorporation filed in the office of the Secretary of the Territory of New Mexico, was not signed and does not purport to contain the signatures or a copy of the signatures of any of the incorporators."

These findings distinctly and without contradiction or doubt, leave the appellant as a pure trespasser. It did not comply with the law to authorize it to do business in New Mexico. There is no finding that the appellant ever adopted the line upon which its road was constructed, much less that part of it which interfered with and conflicted with appellee's adopted location; nor was any plat or profile of its line filed at any time prior to the actual construction of its road, or at any time before December the 12th, 1905, six months after the commencement of this action; nor does it appear anywhere by any finding or otherwise, that it ever made any declaration of intention to build such line of railroad and file the same in the office of the Secretary of New Mexico, or with the Probate Clerk and Recorder of San Juan County. According to the 23d and 24th findings, the appellant had no standing whatever in court, nor under the laws of New Mexico.

The court in the 17th finding, (Tr. p. 89) said:

"That the line so surveyed by the defendant company and which it threatened to and was then about to *construct unnecessarily and wilfully* was laid out so as to cross and recross the line of plaintiff so located and adopted by it as aforesaid, at acute angles, no less than eight times, in a distance of about twenty-seven miles, and that at the time of the institution of this action, it was apparent that the consummation of the said threatened trespass of the defendant would *destroy* the said line of road so located and adopted by the plaintiff."

It hardly requires an argument or citation of authorities to convince a court, especially such a court as this one, that an act which, if done or threatened to be done, would amount to an absolute destruction of property or of rights, is a cause for equitable intervention, and that an injunction in such case is the only adequate remedy. It may be true that appellee could have surveyed and obtained another line which it could operate, and that injury to a certain extent might be estimated in damages if it was deprived of its location; still that gives no right to one party to destroy or threaten to destroy the estate, property or rights of another. A man's house or his property is his castle; he has a right to defend its appropriation by force, and he has a right to apply to the equitable side of the court to protect his possession and his property and the integrity of his property and not allow it to

be devastated, destroyed, altered or changed, or taken away from him by one who has no prior right.

The appellee was on the ground first, made its surveys, locations and adoptions of its right—did what the law required it to do—a short time, comparatively, prior to the time appellant entered upon its acts of destruction of the rights of appellee.

In the 14th finding (Tr. p. 88) it is said:

“That after the survey, location and adoption of the plaintiff’s said line from the boundary of Colorado and New Mexico to the Town of Farmington, as aforesaid, and with knowledge that said line had been and then was marked and staked on the ground, and, on to-wit, *about the 1st day of February, 1905*, the defendant company began at a point in the State of Colorado, about three miles from the City of Durango, and upon its then existing line of railroad in said state, the construction of a line of railroad down the Animas Valley in the direction of the said town of Farmington, and thereupon *in an inclement season, with great haste, prosecuted its work of construction in a southerly direction, following its surveying and engineering parties closely with its grading and track laying forces.*”

These certainly showed the animus of the appellants and a disposition to get ahead, if possible, of appellee and destroy whatever it had done

towards locating and constructing a railroad line between those points. One cannot read these findings without observing that appellee acted in conformity with law. Appellant acted "unnecessarily and wilfully" in violation of the law.

The 27th finding (Tr. p. 91) says:

"That it is apparent from the fact (to say nothing of the other evidence bearing upon the point) that defendant has crossed and recrossed so many times and appropriated so much of the location claimed by plaintiff, in the distance of a few miles, either that the location of plaintiff for that distance is the best obtainable, or that the defendant appropriated it for the purposes of obstruction."

The 7th finding (Tr. 85) states:

"That in the survey, location, adoption and acquisition of the said line between said points hereinbefore stated, the plaintiff company proceeded with *due diligence and in good faith*, and that the line so located and adopted by it was selected after careful survey and examination and after preliminary investigation and reconnaissance, by competent and skilled engineers, as the best line for the construction, maintenance and operation of plaintiff's road between said points, and that the line so selected was and is a practicable and feasible line for the construction, maintenance and operation of such road; *and was and is the best line and the best line obtainable be-*

tween said points."

These are findings which the court cannot go behind. They are the findings in the nature of a special verdict which are binding upon this court and show that appellee, in every respect, complied with the law.

The court has found that the allegations in the complaint have been sustained in substance. Equity cannot lose jurisdiction on the ground that the value of property which will be destroyed can be ascertained, or that another right-of-way may be found, the cost of which might be determined. Appellees had the right to the particular property selected, which has been decided by the court to be the best location which could be obtained for appellee's purposes. It had a special value and equity will protect it.

In *Walker v. Emerson*, 26 Pac. 968 (Cal.) the court said:

"Such an act is an injury to the right, and if threatened to be continued should be enjoined, whatever opinion persons other than the owner may have about the extent of the damage that may result."

In *Lemon v. Guthrie Center*, 86 Am. St. Rep. 361 (Iowa) it is said:

"An examination of all the cases indicates a strong tendency to grant equitable relief whenever the trespass perma-

nently diminishes the substance of an estate in that which constitutes its chief value, without reference to the fact that the value may be measured in money, on the ground that plaintiff is entitled to have the *identity and integrity of his estate* preserved."

This certainly is a universal doctrine.

In *Camp v. Dixon Co.*, 52 i. R. A., 767, it is said:

"If the act complained of threatens to destroy the subject matter in question, the case may come within the principle of permanent injunction, even though the damages may be capable of being accurately measured."

In Federal cases No. 4313, Judge Dillon said:

"So any act of peculiar trespass * * grievous mischief or lasting injury destructive of property, a right or franchise, which is a total destruction of owner's right, these are proper cases for injunction."

In *Kilbourn v. Sullivan*, 130 U. S., 514, it is said:

"Jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances."

If appellant can compel appellee to seek a new line in one place, it can as readily compel it to seek a new line in another; and when that new line is located, appellant or any other corporation, may again compel appellee to seek new locations in as many parts of its line as they may desire. If the only remedy is damages, how many suits might be required before it would be possible to complete the construction of the road?

New Mexico has a statute in regard to railroad crossings. The State of Indiana has one very much similar. In *Lake Shore Company v. Cincinnati Ry. Co.*, 116 Ind. 578, Judge Elliott, the author of a work on railroad law, in announcing the decision said:

"It is very evident that the legislature did not mean to invest the younger company with power to cross at any point, and in any mode it might elect, but that, on the contrary, it meant to prevent the arbitrary exercise of the right to cross the older line. The purpose was to give both corporations an opportunity to agree if they could, as to the compensation, the point of crossing, and the mode in which the crossing should be constructed. It was the intention of the legislature to prevent the arbitrary exercise of power by either senior or junior corporation and to compel them to negotiate concerning the crossing, or, if the senior refused, to enable the junior to bring the matter before the court for consideration and

judgment upon the three elements involved. The compensation, the point of crossing, and the mode of conducting the one line across the other."

It can hardly be supposed that under the state of facts as found by the court that the junior company on the ground, the appellant in this case, could have the right to compel the senior company, who had located its road, to go into the courts to adjudicate its rights, or that any court would recognize the right of the appellant in this case, being the junior company, to *wilfully and unnecessarily* cross so many times in so short a distance the line of the appellee and at a different grade from that which appellee had adopted and at acute angles, so as to make the interferences as dangerous as possible, by keeping the train of cars upon the line of interference the greatest length of time and inviting collisions and other interruptions. Such state of affairs as would exist under conditions like that would render both lines, if constructed, on the right-of-way as appellee had adopted its route and the appellant has constructed its road, absolutely perilous to life and property.

No proceedings at law can furnish adequate remedy to appellee under the circumstances found by the court in this case.

POINT V.

APPELLEE DID NOT HAVE AN ADEQUATE REMEDY UNDER THE CONDEMNATION STATUTE OF NEW MEXICO, NOR WAS IT ELECTED TO A CONDEMNATION.

It appears from the findings of fact in this case that appellee had located its road and adopted it finally before appellant ever did a "lick" of work at any point where the two lines conflict, and in fact, before appellant commenced to construct its line from Durango, Colorado. The only thing appellee had not done up to that time was that its plats and profiles had not been filed, but it had a "reasonable time" in which to do that after the adoption of its final or definite location. Keeping that fact in view and the fact as stated in *Pittsburg Ry. Co. v. Fiske*, 123 Fed. 760, that the

"Status which it was the duty of the court to maintain was that which rightfully and actually existed when the injunction was applied for, and not that which the defendant had wrongfully endeavored to create."

We find that appellee had acquired a *vested right* in its right-of-way as surveyed, located and adopted, prior to the commencement of this suit. Up to the time of the commencement of this action, no work had ever been actually done by appellant in the way of constructing its road at any of the points where the conflict between the two

lines occur; although they had surveyed and staked out a line (but as far as appears had not even adopted it), which conflicted at eight several points with the line as surveyed, located and adopted by appellee. How can it be said that appellee, whose line was not actually appropriated by appellant at the time of the commencement of this suit but had only been trespassed upon to make a survey over it and which appellant threatened to destroy thereafter, could commence an action against the appellant for a condemnation of the right-of-way? Appellant was not in a condition to force appellee to commence such action. Appellant was threatening to take possession violently and unlawfully of appellee's right-of-way and appropriate it to its own use and exclude appellee therefrom, which threatened wrong appellee could not remedy by filing a suit to condemn the land, making the appellant a party to it. It did not recognize, in any way, that appellant had any right, legal, equitable or possessory, to be condemned. Appellant only had, wrongfully, a trespasser's threatened right to possession without any law behind it. But such a threat, if carried into effect, would destroy and did destroy the power of the appellee to construct its line over the same in any safe, practical or judicious way, so far as its operation would be concerned.

Appellant cites Section 5 of Chap. 97 of the Laws of 1905 of New Mexico with reference to crossings and underscores the third sub-division

thereof, which is as follows:

"To determine the respective rights of the different parties seeking to condemn the same property."

That evidently refers to a point where both parties were at the same time seeking to condemn the same property, not where one of the parties had located and acquired a prior right and had practically exclusive right to maintain the property. But in this case the appellant had not filed a suit to condemn any property, except as shown by the 13th additional finding, which says:

"That at the time of the execution of said deed a condemnation proceeding begun by defendant under the statute of New Mexico, was pending against said Edith Young for the purpose of condemning a portion of the land embraced within the right-of-way described in said deed, but *notice of such proceeding had not been served.*"

In that event, appellee could have no notice of the existence of that suit at the time it commenced this suit which was three days after the execution of the deed of Edith Young to appellee. Appellant had apparently neglected or delayed making service in that case which operated, of course, as no notice to appellee. It is sufficient to say that appellee having legally the possession of the right-of-way at the conflicts at the

time of the commencement of this suit or, at least, the right to the same and the appellant not being in actual possession of it, but only having trespassed upon it by surveying lines over it, appellee could not be forced or limited solely to instituting a suit to condemn the right in property which it did not recognize as existing in the appellant.

POINT VI.

“APPELLEE HAD NO ADEQUATE REMEDY AT LAW BY EJECTMENT.”

In appellant's fifth point, it is alleged that appellee “had an adequate remedy under the condemnation statutes of New Mexico and that remedy was exclusive.”

Point VII, made by appellant, notwithstanding the allegation that condemnation was the exclusive remedy, yet states that appellee had an adequate remedy at law by ejectment. The same reason which is urged against the proposition that condemnation proceedings are an adequate remedy, is also good in an action of ejectment. An action of ejectment only lies against the party who is in possession, excluding the rightful owner or person rightfully entitled. In this case, at the time of the commencement of this suit, appellant was not in possession at any one of the points in conflict with reference to which the action in question was commenced. Neither were they in possession by any legitimate pro-

cedure. They had, after appellee had made a final survey and location and adoption of its line, gone upon the same right-of-way at eight different points, by means of a trespass, and surveyed lines over that right-of-way and threatened that it intended to construct its road over such surveyed line, but there is no finding in the case that that line was ever adopted by appellant, further than the finding that after the commencement of the suit in this case, they did actually construct their line of road over it; but there is no finding that they were in possession. On the contrary, the finding is that they were out of possession. Again, whom would an action of ejectment have been commenced, assuming that, as a matter of fact, appellee had lawfully acquired all the right which the statutes would permit, so as to locate its final right-of-way, and had the right to secure title from those possessing it primarily? It had entered into a contract of option with every one of the persons along the line who owned the land individually. It had definitely fixed its location and adopted it, and on the day following the commencement of this suit, filed its map and profile in the secretary's office, and a few days thereafter in the recorder's office of the county.

Who had the prior right? Who had the legal right to possession? Who had the possession in the absence of an actual *possessio pedis* of either of the parties? It does not require argument or

citation of authority to establish this. The findings fix it. The action of ejectment could not have been commenced against appellant until it entered upon and actually took possession of and held the land under a claim of right. It had not done that at the time this action was commenced. What it had done was to trespass with its surveyors upon these rights-of-way; gave out and threatened that it intended to take possession of the crossings it had surveyed and was actually in the act of constructing its line down to the crossings, but not upon them. Every threat and every act indicative of its intention to carry out its threat existed. The only remedy against a threatened wrong and a threatened danger of this kind is in equity and by means of an injunction. Condemnation proceedings cannot interfere with a threatened wrong or injury; neither can ejectment stop it or put it off. A multiplicity of suits, however, might intervene, i. e., appellee might have been compelled to commence suits, each one of them separately against appellant and against each of the parties whose lands appellant went upon at the points of conflict. Suits against them individually could not be joined by putting all the owners into one suit. Besides, if both roads should have been constructed, innumerable suits would have been the result, as well as delays and collisions on the roads caused by trains of cars at the points of conflict.

We insist that there is no error in the court be

low; that the remedy marked out by the Supreme Court of New Mexico is a proper and efficient one, and that it was not possible or right to allow appellant to confiscate arbitrarily or forcibly the rights acquired by the appellee in compliance with statutes.

We therefore ask an affirmance.

T. B. CATRON,
Santa Fe, N. M.
B. W. RITTER,
Durango, Colo.

Attorneys for Appellee.

CATRON & CATRON,
Santa Fe, N. M.,
Of Counsel for Appellee.

